88-1427

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in creating a "continuing violation" theory of ERISA benefit claims by ruling that a separate and independent cause of action for employee benefits accrues, and a plaintiff's limitations period again begins running, each time an allegedly inadequate periodic benefit check is issued.

2. Whether the Ninth Circuit erred by ruling that the statute of limitations applicable to actions for recovery of employee benefits under ERISA Section 502(a)(1)(B) is the three year/six year period that ERISA Section 413 prescribes for suits alleging breach of fiduciary duty rather than an analogous state limitations period.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, The International Association of Machinists and Aerospace Workers Pension Plan, William Winpisinger, Eugene Glover and George Kourpias as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan, and the respondent, Frank Meagher.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the United States Courts of Appeal for the Ninth Circuit is reported at 856 F.2d 1418. The opinion and judgment of the District Court for the Northern District of California is unreported. Both opinions, as well as the appellate court's unreported denial of rehearing, are reproduced in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was entered on September 12, 1988. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the Ninth Circuit on December 1, 1988. This petition for writ of certiorari was filed within 90 days of the lower

court's denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq., are pertinent to this matter:

ERISA Section 204(g), 29 U.S.C. § 1054(g);
ERISA Section 302(c)(8), 29 U.S.C. § 1082(c)(8);
ERISA Section 413, 29 U.S.C. § 1113;
ERISA Section 502(a), 29 U.S.C. § 1132(a)

The texts of these provisions are set forth in the statutory appendix bound with this petition. Pp. 24a-26a.

STATEMENT OF THE CASE

1. The Factual Background [1]

This action was brought by Respondent Frank Meagher (hereafter "Meagher") in the United States District Court for the Northern District of California pursuant to the Employee Retirement Income Security Act of 1974, as amended (hereafter "ERISA"). Meagher, a former General Vice-President of the International Association of Machinists and Aerospace Workers and member of its Executive Council, is a retiree under the IAM Pension Plan. He retired on July 1, 1977 and has been receiving benefits since that date.

Meagher's complaint sought payment of additional pension benefits by challenging the lawfulness of an amendment made to the IAM Pension Plan more than nine years earlier. The challenged amendment, which was adopted in September 1976, phased out, and ultimately eliminated, a post-retirement benefit adjustment mecha-

[1] The facts set out herein are derived from the Plan's motion for summary judgment (dated April 23, 1987) and supporting affidavits of Eugene Glover. Except where noted, none of the facts are disputed.

nism that previously had been a part of the Plan. By its terms, the amendment became effective on January 1, 1977. The complaint was not filed, however, until May 13, 1986.

Petitioner International Association of Machinists and Aerospace Workers Pension Plan (hereafter the "Pension Plan" or "Plan") is a defined benefit pension plan sponsored by the International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter the "Union" or "Grand Lodge"). The Plan's participants are the officers and support staff who work for the Grand Lodge and its subordinate local and regional affiliates. Petitioners William Winpisinger, Eugene Glover and George Kourpias are the Plan's Trustees. The Plan is funded entirely by employer contributions. It maintains its sole offices, its records and accounts, and is administered in Washington, D.C.

The current Plan was created in 1980 as the result of a merger of three predecessor staff plans (frequently hereafter referred to as the "predecessor plans" or "staff plans"). The predecessor plans were established in 1940, 1952 and 1960, respectively. All plans were established pursuant to the IAM International Constitution. The Plan is, and has always been, an integral part of the Union Constitution.

Over the years, amendments to the Plan, including the one challenged in this action by Meagher, have been accomplished through the medium of amendments to the International Constitution. Such amendments are adopted by delegates to the Union's International Conventions and are binding upon the Plan's trustees.

Until 1976, the three staff pension plans shared many common features. One of these was a benefit formula which tied a participant's monthly retirement benefit to his salary at the time of his retirement. Another was a post-retirement benefit adjustment mechanism. Under

that mechanism, a retiree's monthly benefit would be adjusted upward in the same proportion as any increase in the salary level of the Union position from which he retired. This latter aspect of the plans' benefit program was commonly known as the "living pension" feature.

As a result of sharply increased inflation rates in the late 1960's and early 1970's, the cost of maintaining the staff plans increased dramatically. Between 1967 and 1975, the total unfunded liabilities of the staff plans increased from $12,800,000 to $77,100,000. So catastrophic was the plans' experience that their actuaries advised the Union to take remedial action. If corrective measures were not taken, they warned, the plans' costs would escalate to between 30 and 40 percent of total salary or more. Such a high level of contributions would severely hamper the Union's ability to service its members by decreasing the amount of revenue available for organizing, negotiating, and other basic union activities. One of the principal remedies proposed by the actuaries for the plans' financial plight was that the inflation driven "living pension" feature be phased out and eventually eliminated.

The Union's Executive Council, of which Meagher was an active member, considered the actuaries' recommendations during 1975 and 1976 and, notwithstanding the fact that they affected each Council member adversely, subsequently endorsed them. In turn, the Council submitted the suggested amendments to the delegates to the Union's September 1976 International Convention. The delegates, many of whom also would be adversely affected by the amendment, voted overwhelmingly in its favor.[2]

Meagher was present at all of the Executive Council meetings at which the phase out proposal and amendment was discussed. He was, moreover, present at the 1976

[2] The amendment progressively reduced the amount of the "living pension" adjustments starting January 1, 1979. After 1984, no further adjustments were to be made.

Convention that formally adopted the amendment. Indeed, he actively lobbied for support of the amendment among the delegates from the region which he serviced as General Vice-President.[3]

The amendment phasing out the "living pension" feature, by its terms, became effective on January 1, 1977. In the spring of 1977, copies of the revised Union Constitution (which indicated the changes to the plans) were distributed to all Union officers, including Meagher.[4]

Meagher retired on July 1, 1977 and was granted a pension benefit in accordance with the terms of the staff plan applicable to him, as amended. His monthly benefit presently is $2,698.

On January 1, 1979, the date on which the phase out amendment first was implemented, a letter was sent to all retirees, including Meagher, explaining how the amendment affected them specifically. On October 10, 1979, complete summary plan descriptions, as required by ERISA's newly effective disclosure requirements, were sent to all participants and retirees, including Meagher. The latter documents also described in detail how the post-retirement adjustments would be phased out and eliminated.

2. The Shaw Litigation

The amendment eliminating the "living pension" adjustments made no distinction between persons who had

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[3] Affidavit of Glover dated April 16, 1987, para. 21. Meagher stated that he had opposed the amendment and denied his lobbying activities on its behalf. Affidavit of Meagher dated May 4, 1987, paras. 2-4.

[4] On May 16, 1977, copies of the texts of the three predecessor plans, including the provisions for the phase out of the "living pension" feature were submitted to the Internal Revenue Service. Notice of such filing was sent to all plan participants. On February 10, 1978, the IRS issued a favorable determination letter with respect to each plan.

retired before its January 1, 1977 effective date and those who would retire subsequently. One of the pre-1977 retirees was a former District Lodge business representative named Edward Shaw.

On December 1, 1981, Shaw, acting for himself and a class of other pre-1977 retirees, brought suit against the Plan and its Trustees alleging, *inter alia*, that the amendment eliminating the "living pension" feature was a violation of Section 204(g) of ERISA, 29 U.S.C. § 1054(g). That provision prohibits plan amendments which reduce "accrued benefits" unless the amendment is approved by the Secretary of the Treasury pursuant to the terms of ERISA Section 302 (c)(8), 29 U.S.C. § 1082(c)(8).[5]

On the basis of cross motions for summary judgment, the District Court ruled in favor of Shaw, finding that the "living pension" benefit adjustments were "accrued benefits" within the meaning of the Act and that the phase out amendment improperly reduced those benefits. *Shaw v. IAM Pension Plan*, 563 F. Supp. 653 (C.D. CA 1983). Accordingly, it entered a judgment reinstating all 'living pension" adjustments to Shaw "and to all other retirees, like plaintiff, who had retired prior to January 1, 1977." Judgment, *Shaw v. IAM Pension Plan*, CV 81-6076 (AAH) (dated July 15, 1983), p. 2. This judgment was affirmed by the Ninth Circuit in a decision reported at 750 F.2d 1458.[6]

3. The Proceedings Below

a. *The Complaint*

The complaint in this matter was filed on May 13, 1986. Jurisdiction was alleged to be pursuant to ERISA

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[5] Sections 204(g) and 302(c)(8) are reproduced at pages 24a-25a, *infra*. The statutory language places the responsibility of reviewing plan amendments with the Secretary of Labor. This duty was transferred, however, to the Secretary of Treasury.

[6] Certiorari was denied by this Court at 471 U.S. 1137 (1984). The Plan subsequently complied fully with the District Court's judgment.

Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which authorizes suits to "recover benefits due . . . under the terms of . . . [a] plan."[7] In the alternative, relief was sought pursuant to Section 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), which, *inter alia*, permits suits for equitable enforcement of plan provisions.

Although he retired after January 1, 1977, Meagher alleged that there was no meaningful difference between his position and that of Shaw and the other pre-1977 retirees and that the phaseout amendment was one which also reduced his "accrued benefits" in violation of ERISA Section 204(g). Complaint, para. 9. Meagher further alleged that the Trustees, by "adopting" the amendment, breached their fiduciary obligation to manage the Plan for the exclusive benefit of the participants and beneficiaries and therefore acted arbitrarily and capriciously. Complaint, para, 10.

The Plan's answer denied that the amendment, as applied to Meagher, violated ERISA. In addition, the Plan asserted as affirmative defenses that: (a) Meagher's action was barred by the applicable statute of limitations; (b) he is equitably estopped from bringing his action because he supported, endorsed, and approved the phase out amendment in his capacity as a General Vice-President of the Union and a member of its Executive Council; and (c) he failed to exhaust available internal union remedies.[8]

Because no material facts relevant to their statute of limitations defense were in dispute, the Plan moved, on April 24, 1987, for summary judgment on the ground that the applicable statute of limitations had expired and the complaint was therefore time barred.

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[7] The text of Section 502(a)(1)(B) is set out at page 25a, *infra*.

[8] The Trustees urged too that, with respect to Meagher, there was no reduction of "accrued benefits" within the technical meaning of that statutory term.

Meagher opposed the motion and moved for summary judgment in his favor on the merits. The Plan opposed Meagher's cross motion, *inter alia*, on the ground that there were material questions of fact in dispute relevant to the Plan's affirmative defense of estoppel.

b. *The Order of the District Court*

On May 22, 1987, the United States District Court for the Northern District of California (by the Honorable Samuel J. Conti) granted the Plan's motion for summary judgment and dismissed the complaint as untimely. Appendix, pp. 15a-18a.

Although the essence of Meagher's complaint was an action to obtain benefits pursuant to the terms of a plan,[9] the Court ruled that the statute of limitations applicable to Meagher's claim is that contained in ERISA Section 413, 29 U.S.C. § 1113, which requires that actions seeking redress for alleged breaches of fiduciary duty be brought within the earlier of six years of the occurrence of the claimed breach or three years of the date on which plaintiff obtains knowledge of such breach. Appendix, p. 16a. The Court essentially ignored the Plan's position that the limitations period applicable to claims for empolyee benefits pursuant to ERISA Section 502(a)(1)(B) is the three year one provided by District of Columbia law for actions to enforce written contracts.[10]

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[9] Meagher's complaint also alleged that the Trustees had breached their fiduciary duty to him by "adopting" the phase out amendment. However, the District Court in *Shaw* had previously ruled that the Plan's Trustees had no authority with respect to Plan amendments and that: "Absent such authority, it cannot be said that the defendants/trustees breached any duty owed to plaintiffs." 563 F. Supp. 653, 658. Meagher himself subsequently conceded that the amendment was imposed upon the plan by the delegates to Union's 1976 International Convention and the Trustees therefore bore no fiduciary responsibility for that action. Answering Brief of Appellant (dated September 21, 1977), p. 5.

[10] D.C. Code Ann. § 12-301(8). The Plan's position as to the applicable limitations provision was set out at pages 14-17 of its

On the basis of the undisputed facts, the Court then ruled that Meagher, as a member of the Union's Executive Council and General Vice-President was, in the Spring of 1977, fully aware of the plan amendment phasing out his post retirement benefit adjustments. It further found that, in any event:

> . . . the statute of limitations began to run at the latest in mid-October 1979, when plaintiff received a letter from the Union explaining that it was phasing out the living pension. At that time, Meagher had knowledge of the events which gave rise to his cause of action.

Appendix, pp. 17a-18a.

Applying, apparently to give Meagher the benefit of all doubt, the maximum six year limitations period provided by Section 413 (rather than its three year period), the Court concluded that Meagher's limitation period expired by October 1985, one year before the filing of the instant action, and dismissed the complaint.[11]

Meagher timely appealed from the District Court's order to the United States Court of Appeals for the Ninth Circuit.

c. *The Decision of the Ninth Circuit*

In an opinion dated September 12, 1988, the Ninth Circuit reversed the judgment of the District Court. Ap-

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Memorandum of Law in Support of its Motion for Summary Judgment (dated April 24, 1987). See pp. 23a-25a, *infra*.

[11] The court, in addition, rejected the contention made by Meagher that his limitation period was tolled until he first learned in 1985 of the outcome of the *Shaw* case. Citing the Ninth Circuit's ruling in *Blanton v. Anzalone*, 760 F.2d 898, 998 (9th Cir. 1985), as controlling authority (which itself was founded on the decision of this Court in *United States v. Kubrick*, 444 U.S. 111 (1979)), the District Court ruled that Meagher's cause of action accrued, and his limitations period therefore commenced running, when he had "knowledge of the transaction that constitutes the underlying violation". It was, accordingly, irrelevant when, or whether, Meagher learned of the *Shaw* case and the legal reasoning underlying it.

pendix, pp. 1a-11a. Although the question was neither raised by the appeal before it nor briefed by the parties, the Court nevertheless declared that its earlier decision in *Shaw* was equally applicable to persons, such as Meagher, who retired subsequent to the adoption of the amendment phasing out the "living pension" feature.[12] It agreed with the District Court that the applicable limitations period was the three year/six year period prescribed in ERISA Section 413 but determined that Meagher's complaint was not time barred. The basis for the latter ruling was a novel, and *sua sponte*,[13] approach to the question of when a cause of action for employee benefits accrues and the applicable limitations period therefore begins running.

Rather than looking to the point at which Meagher learned that there had been a change in the Plan that adversely affected his benefits, the Ninth Circuit focused instead on when he felt the effects of the amendment. The Court regarded each benefit check issued in an amount less than that to which Meagher claimed entitlement as giving rise to an independent cause of action. The Court did not see the issuance of reduced benefit checks as being merely a ministerial consequence of action taken much earlier (*i.e.*, the adoption of, and announced intention to apply, a plan amendment). It concluded instead that each issuance was a separate violation of the lawful terms of the Plan giving rise to a new

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[12] As noted previously (p. 6, *supra*), the judgment of the district court in *Shaw* was limited to persons who had retired prior to the effective date of the phase out amendment.

[13] At no stage of the proceedings had Meagher ever urged that each monthly payment to him constituted a separate cause of action. His response to the Trustees contention that his limitation period had run was an assertion that the statute had been tolled until he learned of the 1986 ruling in *Shaw*. Brief of Appellees, pp. 13-18.

cause of action under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).[14]

> This is a denial of benefits to which Meagher was, and will become, entitled and with respect to which he seeks "to recover . . . [and] to enforce his rights under the terms of the plan . . ." 29 U.S.C. § 1132 (a)(1)(B). Each check issued to him in an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with ERISA, as required by 29 U.S.C. § 1104(a)(1)(D). A separate cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action.

Appendix, p. 9a. Meagher's action, accordingly, was considered timely with respect to benefits allegedly underpaid during the three years preceding the filing of his complaint.

On December 1, 1988, the Ninth Circuit denied the Plan's petition for rehearing with suggestion for *en banc* review. Appendix, pp. 12a-13a.

REASONS FOR GRANTING THE WRIT

By its *sua sponte* ruling that a cause of action seeking employee benefits pursuant to ERISA accrues each time a benefit check is issued that fails to include the full amount claimed to be due, the Ninth Circuit effectively has eliminated as a defense against such claims the running of the statute of limitations. By so ruling, the Court has spurned the fundamental concept of American jurisprudence that a plaintiff be diligent in the prosecution of a complaint or face the consequence of a time bar.

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[14] The Court regarded the phase-out amendment as "inoperative" and therefore not a lawful plan term.

The Ninth Circuit's ruling in this matter is in conflict with the rulings of other Circuits in two important respects. First, the decision below departs from those of other circuits on the issue of when an ERISA cause of action accrues. Second, it conflicts with the decisions of other circuits on the question of which statute of limitations is appropriately applied in ERISA founded benefit claims. The ruling also conflicts with the principles established by this Court, as well as other Circuits, as to when causes of action accrue under employee protective statutes generally.

The consequences of the lower court's ruling to the administration of the hundreds of thousands of employee benefit plans throughout the United States are extremely serious. Unless the decision is reversed, employee benefit plan trustees and administrators never again will be able to act with the necessary certainty that decisions affecting benefits will at some point cease being subject to challenge. This is so because, under the lower court's rationale, virtually any claim of inadequate benefit payment can be characterized as a separate "improper application" of the lawful terms of an employee benefit plan. Accordingly, plan design choices made in good faith could be the subject of expensive litigation decades after they were made. And, a plan's funding program may prove years later to have been catastrophically inadequate (to the detriment of the benefit security of all plan participants) because a dilatory lawsuit resulted in the voiding of a fiscally critical plan rule or interpretation.

I. THE NINTH CIRCUIT'S RULING THAT THE ISSUANCE OF EACH ALLEGEDLY INADEQUATE PERIODIC BENEFIT CHECK GIVES RISE TO A SEPARATE AND INDEPENDENT ERISA CAUSE OF ACTION, AND THAT A PLAINTIFF'S LIMITATIONS PERIOD BEGINS RUNNING ANEW WITH THE ISSUANCE OF EACH CHECK, ESTABLISHES A "CONTINUING VIOLATION" THEORY THAT IS IN CONFLICT WITH DECISIONS OF THE FIRST, FOURTH, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS

To the lower court, it is irrelevant when, or even whether, a plaintiff learns that his benefit interests clearly and unequivocally have been affected by some plan action or event. A plaintiff, the Court has decreed, may sue for benefits until he dies and, through the vehicle of his estate, for several years thereafter.[15] In essence, the Ninth Circuit has crafted a "continuing violation" theory for ERISA benefit claims.

Fundamental to its "continuing violation" theory is the Court's characterization of the issuance of each allegedly inadequate employee benefit check as a "wrongful application" of the plan. Appendix, pp. 8a-11a. It is through such a characterization that each periodic payment can be regarded as the basis for an independent cause of action. And, it is this characterization that makes the impact of the Court's decision so pervasive. Virtually any failure to pay the full benefit amount which

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[15] The Ninth Circuit's holding appears to be equally applicable to situations where a benefit that ordinarily is paid periodically is denied entirely rather than simply reduced. The logic underlying the decision below also would require the conclusion that a cause of action to challenge such denial would accrue anew each time the periodic payment would have been due.

a participant claims as properly due can be characterized as a "wrongful application" of a plan.[16]

The "continuing violation" principle adopted by the Ninth Circuit is directly in conflict with those of other

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[16] The rationale employed by the lower court in concluding that the IAM Plan was "improperly applied" required an exceptionally strained reading of ERISA. The court, in reaching its conclusion, first looked to the phrase in Section 302(c)(8) stating: "[n]o amendment . . . which reduces the accrued benefits of any participant shall take effect" unless approved by the Secretary. Using this phrase as a predicate, the court concluded that the phase out amendment was "inoperative." The court then determined that: "The passage of the [phase out] amendment was not a violation of ERISA" because "an amendment must be adopted before it may even be submitted to the Secretary for approval." Appendix, p. 8a. The court, accordingly, declared that the issuance of each new benefit check was an unlawful application of the "inoperative" phase out amendment and therefore constituted a separate violation of the plan.

The Court's rationale was based on a logical *non sequitur*. Moreover, it ignored the clear language of another ERISA provision. If the phase out amendment could be said to have reduced Meagher's "accrued benefits," the phrase "shall not take effect" in section 302(c)(8) would not prevent the amendment from nevertheles being unlawful under ERISA and therefore challengeable immediately. Moreover, ERISA Section 204(g) provides expressly that: "The accrued benefit of a participant under a plan may *not* be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8)." [Emphasis added] This latter provision makes the promulgation of an amendment unlawful whether or not it "takes effect."

In any event, the exact rationale used by the lower court to justify its conclusion that the issuance of each benefit check was an "improper application" of the plan's terms is of little consequence. Virtually any plan rule, interpretation, or eligibility determination can be attacked by characterizing a plan's allegedly inadequate periodic benefit payments as being an "improper application" of the plan's "lawful" provisions. It can be said with equal force and logic that a plan is "wrongfully applied" where the allegedly inadequate benefit amount is the result of: (a) a plan amendment challenged as unlawful, (b) an allegedly arbitrary or capricious plan rule or interpretation, or (c) the failure to properly apply a plan provision to the facts surrounding a specific benefit application.

circuit courts of appeals. Such courts hold that a cause of action to obtain employee benefits accrues only once: when the plaintiff first learns that a plan decision has been made that unambiguously and irrevocably has affected his benefit interests. *Martin v. Bankers Trust*, 565 F.2d 1276, 1278 (4th Cir. 1977); *Cowan v. Keystone Profit Sharing Fund*, 586 F.2d 888, 895 (1st Cir. 1978); *Paris v. Wolf, Inc., Profit Sharing Plan, Etc.*, 637 F.2d 357, 360-361 (5th Cir. 1981), *cert. denied*, 464 U.S. 836 (1981); *Miles v. New York State Teamsters Conference Pension and Retirement Fund*, 698 F.2d 593, 598 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); *Belland v. Pension Benefit Guaranty Corp.*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), *affd*, 726 F.2d 839 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 880 (1984); *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 538 (N.D. Oh. 1987), *aff'd*, 845 F.2d 325 (6th Cir. 1988).

Most frequently, an ERISA benefit claim accrues (and the limitations period begins running) when a specific application or request for benefits is denied. *Paris v. Wolf, Inc., Profit Sharing Plan, Etc., supra*; *Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). In many cases, however, a benefit claimant is fully aware from the outset that a change in a plan or plan policy has been made or that other dispositive action affecting his interests has been taken. In such instances, the courts hold that the action accrues from the date on which the plaintiff actually had knowledge of the adverse action. *Cowan v. Keystone Profit Sharing Fund, supra* [17]; *Miles v. New York State Team-*

[17] The plaintiff in *Cowan* also alleged that a plan amendment unlawfully deprived him of benefits. In discussing when his cause of action accrued, the First Circuit noted that: "The basic wrong he complains of . . . was not done when he was refused benefits in 1977 but [instead] occurred earlier, when the Catch up Plan [the plan amendment in issue] was promulgated." "This is not", the court observed, "a case in which the application or interpretation of the terms of a pension plan are unclear." "The terms of the amendment and its effect upon [plaintiff] were always clear."

sters Conference Pension and Retirement Fund, 698 F.2d 593 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983)[18]; *Belland v. Pension Benfit Guaranty Corp., supra*; *Paris v. Wolf, Inc. Profit Sharing Plan, Etc., supra.*[19]

The notion that the issuance of each allegedly inadequate benefit check constitutes an independent (or continuing) cause of action from which the applicable statute of limitations begins running anew has been rejected by the First, Fourth, Fifth and District of Columbia Circuits. *Martin v. Bankers Trust*, 565 F.2d 1276, 1278 (4th Cir. 1977); *Cowan v. Keystone Profit Sharing Fund*, 586 F.2d 888, 895 (1st Cir. 1978); *Miles v. New York State Teamsters Pension Fund*, 698 F.2d 593, 598 (2d Cir. 1982), *cert. denied*, 464 U.S. 829 (1983); *Belland v. Pension Benefit Guaranty Corp.*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), *aff'd*, 726 F.2d 839 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 880 (1984); *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 538-539 (N.D. Oh. 1987), *aff'd*, 845 F.2d 325 (6th Cir. 1988). The decisional conflict becomes apparent with a review of the foregoing cases.

In *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977), the plaintiff had been denied pension benefits only a few months before the effective date of ERISA. Section 514 of ERISA, 29 U.S.C. § 1144, expressly provides that remedies under the Act do not apply to any cause of action that accrued before its effective date. Notwithstanding this limitation, the plaintiff sought to bring an action pursuant to the statute by contending that the continued refusal of the defendants to pay bene-

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[18] "A plaintiff's ERISA cause of action accrues, and the . . . limitations period begins to run 'when there has been a repudiation by the fiduciary which is clear and made known to the beneficiaries'." 698 F.2d at 598.

[19] The Fifth Circuit observed that, unlike the case in *Cowan*, the plaintiff before it could not be said to have known unequivocally that his benefit interests had been affected adversely prior to the actual denial of his application. 637 F.2d at 360-361.

fits properly due under the terms of the plan constituted a continuing violation therefore giving rise to a post-ERISA cause of action. The Fourth Circuit disagreed. In its view:

> The contention that the failure to pay such benefits was a continuing breach of duty which brought the claim within the ambit of federal legislation is without merit since it, in effect, would read the . . . [effective date] out of the statute.

565 F.2d at 1277.[20]

Cowan v. Keystone Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978), involved an attempt by a plaintiff to challenge a pre-ERISA plan amendment that excluded him from receipt of certain supplemental retirement benefits. Although the amendment in issue had been promulgated prior to the effective date of the statute, the plaintiff nevertheless urged that his exclusion could be challenged in the federal courts pursuant to ERISA because the benefits to which the challenged amendment pertained were distributed after ERISA's effective date. His cause of action, he contended, arose when these benefits, to which he believed he was entitled, were paid. The First Circuit, in rejecting his argument, observed:

> This is not a case in which the application or interpretation of the terms of a pension plan are unclear. In such cases, plaintiff obviously has no cause for complaint until he is refused benefits to which he has some colorable claim, since it cannot be known earlier how the instrument will be interpreted by the trustees. In this case, . . . there is no question that

[20] Petitioners wish to point out that the Fourth Circuit appears to be inconsistent in its approach to the "continuing violation" concept. In *Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d 975 (4th Cir. 1987), the Fourth Circuit permitted a plaintiff to maintain an action for benefits arguably payable during the three years prior to the filing of her complaint. The *Dameron* court, however, did so without discussion or exposition of any legal rationale justifying such result.

> the explicit terms of the Catch Up Plan [the amendment which was in issue] gave him no right to receive further benefits in 1976 or 1977. * * * The basic wrong of which he complains of thus was not done when he was refused benefits in 1977 but occurred earlier, when the . . . Plan was promulgated. Thereafter the trustees could be expected to administer the Plan in accordance with its terms. * * * [T]he wrong, if any, was done when the . . . Plan amendment was adopted in 1974.

586 F.2d 888 at 895.

A Massachusetts district court subsequently drove the point home still further by holding, in a similar case: "Plaintiff's contention that a new cause of action arises under ERISA every time he receives a benefit less than that to which he feels entitled is untenable." *Comstock v. Pfizer Retirement Annuity Plan*, 524 F.Supp. 999, 1001 at Fn. 2 (D. Mass. 1981).

The District of Columbia Circuit similarly has rejected the notion that the receipt of each allegedly insufficient benefit check gives rise to a new cause of action. *Belland v. PBGC*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), *affirmed*, 726 F.2d 839 (1984), *cert. denied*, 469 U.S. 880, 105 S.Ct. 245 (1984). In that matter, the trustees of a pension plan drastically reduced plaintiffs' monthly benefit amount claiming that the plan, which had terminated, could not support the greater benefits. Plaintiffs contended that this action breached an implied promise made to them and filed suit against the defendants. The District of Columbia limitations period applicable to enforcement of implied contracts was three years. However, the benefit reduction which was the subject of the complaint had been implemented more than four years before the suit's filing. Plaintiffs urged, *inter alia*, that their action was not time barred because each reduced payment constituted a separate breach of the pension agreement. Dismissing this contention out of hand, the District of Columbia Circuit held that a cause

of action for improperly denied benefits arises when the plaintiff learns that an irrevocable adverse decision has been made concerning his benefit expectations and is not resurrected each time a participant receives a benefit check containing less than the amount he believes should be due. As the court succinctly put it:

> . . . [P]laintiffs' contention that each reduced payment of pension funds should be viewed as a continuing breach . . . is severely flawed. In contrast to installment contracts which run for a fixed period and which often are partially performed, the 1975 decision to decrease plaintiffs' benefits was irrevocable and extended for an indeterminate period equal to the length of plaintiffs' lives. As a result, a continuing violation theory to forestall the running of the statute of limitations is clearly inapplicable to plaintiffs' claim. Otherwise defendants correctly argue that plaintiffs advance the absurd proposition that the statute of limitations should not begin to run until the last plaintiff has died.

4 E.B.C. at 1166.

In *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534 (N.D. Oh. 1987), *aff'd per curiam*, 845 F.2d 325 (6th Cir. 1988), a plan participant who had been a salaried employee at his retirement sought an increase in his monthly pension on the ground that the plan administrator had improperly refused to credit him with service for the years when he was an hourly employee. The court found his complaint to be time barred because he had learned some ten years before filing suit that he would not receive credit for the disputed period. Rejecting the plaintiff's contention that his limitations period did not commence running until he first began receiving insufficient pension payments, the court stated:

> The limitations period began to run when plaintiff knew the effect of the Plan upon his hourly service. Defendants' denial of additional years' credit effectively occurred at that time. The Court finds no

> merit in plaintiff's legal arguments that notice to plaintiff in or around 1973 served merely as an anticipatory repudiation and that plaintiff did not need to bring suit until pension payments began. . . . [T]he "proper focus is on the time of the [wrongful] act, not the point at which the *consequences* of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6 (1981). [emphasis in original]

659 F. Supp. 534 at 539.

The foregoing cases, it should be noted, are entirely consistent with the well established rule of law that a cause of action accrues, and a limitations period commences running, when a plaintiff may *first* bring suit to obtain the relief he seeks. *Clark v. Iowa City*, 87 U.S. 583 (1874); *Impro Products, Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983) (". . . the cause of action accrues when the right to resort to federal court [is] perfected."); *Santos v. District Council of New York City and Vicinity of United Brotherhood of Carpenters*, 619 F.2d 963, 968 (2d Cir. 1980) ("A cause of action ordinarily accrues when 'the plaintiff could first have successfully maintained a suit based on that cause of action' ").

The plan amendment about which Respondent Frank Meagher complains in this action was adopted in September 1976 by vote of the delegates to an International Association of Machinists and Aerospace Workers International Convention. The amendment, which the Union's Constitution made binding upon the Trustees, was unequivocal in its renunciation of future benefit adjustments. Hence, if the "living pension" adjustments were "accrued benefits" within the meaning of the Act, then those "accrued benefits" were reduced on January 1, 1977, the date the amendment became effective.

The court below concedes that Meagher was fully aware from the outset that his benefit interest had been affected adversely by the 1977 amendment. Meagher was an International General Vice-President who had been

actively involved in each step of the amendment's consideration and promulgation. It is clear that he could have brought suit against the Plan as early as 1977. Certainly, Meagher could have done so, as the District Court noted, by the Fall of 1979, when the Plans' summary descriptions were issued. By the issuance of those documents, the Trustees unequivocally renounced the future payment of "living pension" adjustments. Meagher, instead, chose to wait more than nine years before pursuing his claim.

It was only by virtue of the Court's adoption of its "continuing violation" theory that Meagher's suit was considered timely. As noted above, other courts take a radically different approach to claims of continuing violations in employee benefit contexts.[21] The conflict among the circuits which the Ninth Circuit's decision has created demands resolution by this Court.

II. THE "CONTNUING VIOLATION" CONCEPT APPLIED BY THE NINTH CIRCUIT IS IN CONFLICT WITH PRINCIPLES OF LAW ESTABLISHED BY THIS COURT AND OTHER CIRCUITS AS TO WHEN CAUSES OF ACTION ACCRUE UNDER EMPLOYEE PROTECTIVE STATUTES GENERALLY

At the foundation of the lower court's ruling is the assumption that a cause of action to remedy an alleged wrong remains vital so long as the effects of the alleged

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[21] It should be noted that the federal courts, in some ERISA fiduciary liability cases, have found the occurrence of "continuing violations" of fiduciary duties. These cases, however, are very limited in scope and have no applicability to actions, like the instant proceeding, for benefits. Such cases advance the legal proposition that ERISA imposes a continuing fiduciary duty to monitor and review fund investments. Accordingly, an action for breach of the fiduciary duty to monitor or review investments can be brought even though an action alleging that the initial purchase of the suspect asset was imprudent is time barred. See *Morrisey v. Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977); *Whitfield v. Cohen*, 682 F. Supp. 188, 196 (S.D. N.Y. 1988).

wrong are felt. But, this Court has made it plain in the context of other employee protective statutes that such an approach is improper. Rather it is the time a plaintiff becomes aware of the facts that constitute the claimed violation that gives rise to a cause of action. A cause of action is not resuscitated simply because the effects of the purported violation may not be felt until later or continue for a period of time. *Florida v. Long*, —— U.S. ——, 101 L.Ed.2d 206, 221 (1988) ("It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation"); *United Airlines, Inc. v. Evans*, 431 U.S. 553, 559 (1977) (a discriminatory act begins the running of the statute of limitations, even if the act has consequences at a later time); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8-9 (1981) ("continuing *impact* from past violations is not actionable").

These principles are not limited to employment discrimination cases. They are followed as well by the various circuit courts of appeals in the contexts of other employee protective statutes.

With respect to suits pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging denial of fair representation, the courts find that "continued . . . activity after [a union's] initial failure to respond to a grievance request does not constitute a continuing violation of the duty of fair representation." *Adams v. Budd Co.*, 846 F.2d 428, 431 (7th Cir. 1988), cert. pending; *Metz v. Tootsie Roll Ind., Inc.*, 715 F.2d 299, 305-6 (7th Cir. 1983). The same position is held in fair representation cases brought under the Railway Labor Act. *Englehardt v. Consolidated Rail Corp.*, 756 F.2d 1368, 1370 (2d Cir. 1985) (". . . the union's activity (or lack thereof) since the [challenged] agreements were entered into does not constitute a continuing violation . . . ."). Similarly, in connection with the employee "whistleblower" protective provisions included in the En-

ergy Reorganization Act, the Fourth Circuit has ruled that a cause of action for retaliatory discipline accrues, for purposes of the running of the limitations period, when the plaintiff learns of the employer's adverse determination rather than when the effects of that decision are felt later. *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988).

The Ninth Circuit in this matter has made the fundamental error of confusing an action (the adoption or implementation of the disputed phase-out amendment) with its ministerial consequences (reduced pension checks).[22]

III. THE NINTH CIRCUIT'S RULING THAT THE STATUTE OF LIMITATIONS APPLICABLE TO ACTIONS FOR RECOVERY OF EMPLOYEE BENEFITS UNDER ERISA SECTION 502(A)(1)(B) IS THE THREE YEAR/SIX YEAR PERIOD WHICH ERISA SECTION 413 PRESCRIBES FOR SUITS CHARGING BREACH OF FIDUCIARY DUTY CONFLICTS WITH THE DECISIONS OF THE SECOND, FOURTH, SIXTH, SEVENTH AND EIGHTH CIRCUITS

The decision below squarely conflicts with the rulings of other circuits for a second reason. An essential element of the Ninth Circuit's decision is its conclusion that the limitations period applicable to suits brought by a participant to recover benefits due under the terms of an employee benefit plan is the three year/six year period set out in ERISA Section 413, which provision pertains to suits seeking relief from alleged breaches of fiduciary duty.[23] But, every other Circuit that has con-

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[22] Once a decision concerning a participant's benefits is made, the plan's subsequent dealings with him are purely ministerial. Checks (if any payment is to be made) are issued routinely (usually by computer).

[23] Appendix, p. 7a. The Court of Appeals opinion contains dicta suggesting that the Trustees breached a "duty to administer the plan in accordance with the documents and instruments of the Plan

sidered the question of which statute of limitations is applicable to such employee benefit disputes has adopted and applied, pursuant to the decisional guidelines established by this Court in *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1983), the state limitations period applicable to actions to enforce written contracts. *Miles v. New York State Teamsters Pension Fund*, 698 F.2d 593, 598 (2d Cir. 1982), *cert. denied*, 464 U.S. 829 (1983); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987); *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 539 (N.D. Oh. 1987), *aff'd*, 845 F.2d 325 (6th Cir. 1988); *Jenkins v. Teamsters Local 705 Pension Plan*, 713 F.2d 247, 252 (7th Cir. 1983); *Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430, 432 (8th Cir. 1988). See also Bruce, *Pension Claims*, Bureau of National Affairs (Washington, 1988), p. 664.[24] Similar rulings have been made by district courts in other Circuits. *Ferguson v. Greyhound Retirement & Disability Trust*, 613 F. Supp. 323, 324 (E.D. PA 1985); *c.f. Corkery v. Superex Drugs Corp.*, 602 F. Supp. 42 (M.D. FL 1985).

Section 502(a)(1)(B) authorizes a plan participant to bring suit "to recover benefits due him under the terms

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that are not inconsistent with ERISA". Appendix, p. 9a. However, the lower court did not actually find the cause of action to which it applied the three year/six year limitations period to be based on fiduciary considerations. The Court held only that Meagher's claim was "stated timely . . . under 29 U.S.C. § 1132(a)(1)(B) [ERISA § 502(a)(1)(B)]." Appendix, p. 10a. That section authorizes suits to recover benefits due under the terms of a plan. It is other ERISA provisions which afford jurisdiction for actions seeking to remedy alleged fiduciary breaches. ERISA §§ 502(a)(2) and (3); 29 U.S.C. §§ 1132(a)(2) and (3).

[24] "For benefit claims based on the terms of a plan, the courts have almost uniformly held the most analogous state statute of limitations is to be applied to test the timeliness of an action—even though many claims for benefits under the terms of a plan are framed at least in the alternative, as claims for breach of fiduciary duty."

of his plan". However, ERISA does not establish a limitations period within which benefit claims pursuant to that section must be brought. *Jenkins v. Teamsters Local 705 Pension Plan, supra.* ERISA itself contains only one limitations provision: Section 413, 29 U.S.C. § 1113. Section 413, by its terms, is applicable only to actions seeking relief from alleged breaches of fiduciary duty.[25]

This Court has provided explicit guidance as to the approach which federal courts must take in instances where a federal remedial statute is silent on the subject of a limitations period. In *United Auto Workers v. Hoosier Cardinal Corp., supra,* it held that such statutory gaps should be filled by applying to the federal claims the most analogous state statute of limitations. See also the Court's more recent decision in *Reed v. Transportation Union,* —— U.S. ——, 102 L.Ed.2d 665 (1988). The failure of the court below to follow the *Hoosier Cardinal* principles by itself renders its ruling materially inconsistent with those of other Circuits.

Although it cannot be said that the final outcome of the instant litigation will turn on the issue of which of the arguably appropriate statutes of limitations should have been applied by the court below,[26] this case nevertheless presents the Court with the opportunity to resolve an issue critical to the administration of ERISA's remedial scheme. It is esential that both plaintiffs and defendants know with certainty the boundaries of available relief under ERISA.

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[25] The text of Section 413 is reproduced at p. 25a, *infra.*

[26] If this Court concludes that an ERISA cause of action to obtain employee benefits does not arise anew with the issuance of each allegedly inadequate benefit check, it is irrelevant whether the three year limitations period applicable to enforcement of contracts under District of Columbia law (as urged by the Fund below or the three year/six year period prescribed by ERISA Section 413 is adopted. The instant complaint was not filed until more than nine years after the phase out amendment became effective.

IV. THE "CONTINUING VIOLATION" CONCEPT ANNOUNCED BY THE NINTH CIRCUIT WILL HAVE A SERIOUSLY ADVERSE IMPACT ON EMPLOYEE BENEFIT PLAN ADMINISTRATION AND UNDERMINE THE BENEFIT SECURITY OF PLAN PARTICIPANTS

The consequences of the lower court's decision to the administration of the more than 875,000 private employee benefit plans throughout the United States [27] are very serious. By effectively ruling that any decision by a plan sponsor, board of trustees or administrator that arguably affects a participants's benefits is forever subject to judicial challenge, the Ninth Circuit has destroyed a fundamental premise upon which employee benefit plans are established and maintained: the presumption that, at some fixed point in time, those decisions will become unchallengeable, and therefore final. Indeed, finality is essential if employee benefit plans are to provide the promised benefits upon which their participants rely.

Many sorts of decisions made by plan sponsors, trustees, and administrators can affect the amount of benefits. This is particularly true with respect to decisions relating to basic plan design issues such as participation, eligibility, accrual and vesting rules. But, trustee interpretations of plan rules also can have a significant impact on benefits. The reason why these sorts of decisions have such an effect on benefits is that they are, of necessity, a major factor in the plan's actuarial assumptions and funding projections. Accordingly, the judicial overruling or limitation of a fiscally critical plan rule or interpretation can have a direct impact on the sufficiency of a plan's funding and, concomitantly, the benefit security of its participants.

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[27] Number of plans derived from U.S. Department of Labor tabulations of 5500 forms and Employee Benefit Research Institute tabulations of Internal Revenue Service determination letter data. *Employee Benefit Notes*, Vol. 9, no. 5, May, 1988, pp. 7-8, published by the Employee Benefit Research Institute.

Without the assurance that its rules are, or will soon become, final, the ability of employee benefit plans to provide promised benefits is substantially jeopardized because funding projections (which by their nature must be long term) cannot be made with any degree of precision. However, where such a rule is rendered invalid years (or even decades) after its adoption, as the holding below now permits a court to do, the plan may suddenly find itself catastrophically underfunded.

Underfunding resulting from the belated nullification of a critical plan rule will severely prejudice the plan's participants.[28] At the very least, their benefit security will be badly compromised.[29] Indeed, their plan may be forced to terminate and anticipated benefits lost because they no longer are backed by adequate assets.[30]

Even when termination can be avoided, the injury to a plan's participants still will be great. This is so because

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[28] In most instances, the effect of litigation concerning a plan rule, interpretation, or action brought by an individual will be the same as that resulting from a class action. ERISA imposes on plan trustees the obligation to treat in the same manner all plan participants who are similarly situated. See, e.g.: *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982). Accordingly, it is not uncommon for the resolution of benefit disputes initiated by a single individual nevertheless to effect whole classes of, if not all, participants.

[29] In the instant case, the level of unfunded benefits would increase dramatically if judgment ultimately were entered and its underlying bases applied to all plan participants. The Plan's actuaries have estimated the potential cost of reinstating the "living pension" feature to be as much as $110,000,000. To amortize this massive additional liability in compliance with ERISA's funding rules, the International Union would be forced to contribute annually to the Plan an amount equal to 50.2% of payroll.

[30] In a welfare plan, benefits may be lost altogether because such benefits are not insured. But, the actuarial insolvency of a pension plan is likely to result in a loss of benefits too since not all benefits are guaranteed by the Pension Benefit Guaranty Corp. See generally Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.*

a funding deficiency, whatever its cause, must eventually be remedied. In the majority of cases, the only revenue which a plan could use to meet a serious actuarial deficit is the stream of future employer contributions.[31] The necessity to divert a portion of this stream, however, leaves a plan with no option but the reduction of the rate at which future benefits accrue.[32] When this occurs, each active plan participant, in essence, suffers an involuntary pay cut.

The Ninth Circuit's decision in this matter will cause harm to plan participants for another reason. Because trustees and administrators no longer can presume that the rules defining the structure of their plans are final, they will be forced to become far more conservative in their funding projections for new plans (or additional benefits in existing programs) as a hedge against the possibility that a fiscally critical plan rule will be overturned some day. As a result of this new conservatism, it can reasonably be expected that benefit levels will be depressed markedly below where they otherwise would be.

The state of perpetual instability in the employee benefit system caused by the Ninth Circuit's ruling is itself sufficient reason for review of this matter.

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[31] This is particularly true with respect to collectively bargained pension plans. Contribution rates to such plans generally cannot be increased mid-term.

[32] As this Court has observed in another context: "If the reserves prove inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees." *Los Angeles v. Manhart*, 435 U.S. 702, 703 (1978). This is so because employer contributions are set at a rate estimated (through actuarial methods) to be sufficient to pay both for the expected accrual of future benefits and amortize any past service credit granted participants.

CONCLUSION

Limitation periods are a fundamental element of the American legal system.'[33] Their primary value is to provide fairness to potential defendants. The expiration of a limitation period enables a party "to conduct its daily business without the fear of having to defend against stale claims and unfair surprises." Limitations are also beneficial to the judicial system because they promote a prompt review of contested claims and help to keep already overloaded court dockets from becoming worse. And, limitations serve the interest of society because they "help to preserve stability in commercial relations."[34] As one commentator has put it:

> . . . legislators design statutes of limitations to protect the interests of defendants, the courts, and society. Failure of a litigant to bring suit within the specified limitations period will generally result in dismissal of an otherwise valid claim. Such a result may appear harsh in any particular case since it may deny an injured party relief. The overall benefits, however, of statutes of limitation generally outweigh their disadvantages.

Determining Limitation Periods, supra, note 2, at pp. 898-899.

The Ninth Circuit, by its decision below, has spurned these important principles. As a result, employee benefit plan participants no longer need be diligent in pursuing claims. Plan rules and decisions made decades earlier

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[33] *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 Southwestern Law Journal 895, at pp. 897-898 (1987). For a perspective on the development of limitations principles from ancient legal systems to the present, see the historical references cited in *Special Project; Time Bars in Specialized Federal Common Law*, 65 Cornell Law Review 1011, at pp. 1020-1023 (1980); and *Developments in the Law: Statutes of Limitations*, 63 Harvard Law Review 1177, at pp. 1177-1180 (1950).

[34] *Determining Limitation Periods, supra* note 2, at pp. 897-898.

now remain susceptible to challenge. Accordingly, the volume of ERISA litigation can be expected to increase markedly and the burden on the federal court system to become even greater. But most importantly, the stability necessary to the efficient functioning of the employee benefit system has been undermined totally.

For the reasons set forth herein, petitioners respectfully request that a writ of certiorari be issued to the court below.

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March 1, 1989

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2312

D.C. No. CV-86-2435-SC

OPINION

FRANK MEAGHER,
Plaintiff-Appellant,
v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; WILLIAM WINPISINGER, EUGENE GLOVER; and GEORGE KOURPIAS, as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Samuel Conti, District Judge, Presiding

Argued and Submitted
April 15, 1988—San Francisco, California

Filed September 12, 1988

Before: Joseph T. Sneed, Procter Hug, Jr. and Alex Kozinski, Circuit Judges.

Opinion by Judge Hug

OPINION

HUG, Circuit Judge:

Plaintiff Frank Meagher appeals from the district court's award of summary judgment in favor of the International Association of Machinists and Aerospace Workers Pension Plan ("the Plan") and the Plan's trustees. The district court held that Meagher's action was barred by the applicable statute of limitations under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1113 (1982). We reverse the district court's judgment.

I

Frank Meagher was an officer of the International Association of Machinists and Aerospace Workers ("IAM") for 20 and one-half years prior to his retirement on July 1, 1977. That organization, as an employer, administered an employee pension plan for the officers, organizers, and support staff it employed. Meagher's rights under the Plan had fully vested and accrued years prior to his retirement. The Plan contained a "living pension" feature that increased the monthly benefit payments proportionately to any future salary increases of the position from which the pensioner retired. Thus, under this provision, Meagher's pension benefits were tied to the current salary of the job he held before he retired. *See Shaw v. Int'l. Assoc. of Machinests and Aerospace Workers Pension Plan*, 750 F.2d 1458, 1459-60 (9th Cir.) (explaining the living pension feature), *cert. denied*, 471 U.S. 1137, (1985).

In September, 1976, the delegates to the 1976 IAM convention voted to amend the pension plan to phase out the living pension feature. Under the amendment, the living pension increases were to be progressively cut back from January 1, 1979 on, and were scheduled to end January 1, 1985. In February, 1979, soon after the Plan's trustees began implementing the phase-out, letters were sent to all retirees explaining the effect of the amendment upon their benefits. In October, 1979, the trustees sent Summary Plan Descriptions to all plan participants, describing how the living pension feature was being phased out. The cover letter stated that the Plan had been qualified by the IRS and had been "revised to comply with [ERISA]."

On December 1, 1981, a plan participant, Edward Shaw, filed a class action in federal district court against the Plan and its trustees, challenging the application of the amendment. Shaw, who had retired on January 1, 1975, brought the action individually and on behalf of those similarly situated. The district court in that action found that "the actions of defendants in attempting to phase-out the living pension feature in the pension plan were not justified under ERISA. . . ." *Shaw v. International Ass'n of Machinists-Aerospace*, 563 F. Supp. 653, 657 (C.D. Cal. 1983). We affirmed on January 11, 1985. *See Shaw*, 750 F.2d at 1466.

Our analysis in *Shaw* focused on 29 U.S.C. § 1054 (g)(1), which provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title." 29 U.S.C. § 1054(g)(1) 1982.[1] Section 1082(c)(8) sets forth certain criteria

[1] The amended version of 29 U.S.C. § 1054(g)—which was not before us in *Shaw*—reads as follows: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title." 29 U.S.C.A. § 1054(g)(1) (Supp. 1988). The

an amendment must satisfy in order to reduce accrued benefits. One criterion is that the amendment must meet with the approval of the Secretary of the Treasury. 29 U.S.C. § 1082(c)(8) (1982). The Secretary may approve the amendment only if he determines that it is "necessary because of a substantial business hardship." *Id.* The trustees had not obtained the Secretary's approval by the time of the *Shaw* case, nor have they obtained it since.[2] Under the plain language of section 1082(c)(8), "No amendment . . . which reduces the accrued benefits of *any* participant *shall take effect*" unless the Secretary approves it. (Emphasis added.) Because an amendment cannot take effect without the Secretary's approval, it cannot be applied to reduce the accrued benefits of any participant under the Plan, as specified in 29 U.S.C. § 1054(g)(1). The amendment is simply inoperative, and the Plan must be administered without giving any effect to the amendment.

In *Shaw*, we had to determine first whether the living pension feature was, indeed, an accrued benefit, for the prohibition of section 1054(g)(1) applies only to the reduction of "accrued benefits," and the Secretary's approval, as provided for in section 1082(c)(8), is necessary only for amendments which reduce the "accrued benefits" of any participant. We determined in *Shaw* that the living pension feature was an accrued benefit, stating: "[The] entire [IAM] pension benefit—including the living pension feature—was promised, anticipated, and *ac-*

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reference to section 1441 in the amended version, however, does not affect our analysis here. The parties do not claim that the amendment in question is one described in section 1441. Thus, for simplicity's sake, we will refer to section 1054 in its pre-amended form.

[2] Section 1082(c)(8) provides a ninety-day limit after a notice of an amendment is filed within which to approve or disapprove the amendment. If no action is taken, it is deemed approved. In this case, the required notice of the amendment was never filed with the Secretary.

crued." *Shaw*, 750 F.2d 1466 (emphasis added). We noted the Supreme Court's statement that " 'Congress through ERISA wanted to ensure that "if a worker has been *promised a defined pension benefit* upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—. . . he actually receives it" ' " *Shaw*, 750 F.2d at 1465, *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

Because the amendment was one that decreased accrued benefits and the Secretary's approval was not obtained, we held that the amendment did not take effect. Having made this determination, it was clear that the amendment could not be applied to *anyone* because the amendment had not taken legal effect, and, indeed, could not take effect until the Secretary's approval had been obtained in accordance with 29 U.S.C. § 1082(c)(8). We stated in *Shaw*:

> The IAM declined to take advantage of the statutory escape valve that allows the Secretary to approve amendments decreasing accrued benefits upon a showing of substantial business hardship. 29 U.S.C. § 1082(c)(8). Perhaps the IAM can now submit its discussion of financial hardship, which is irrelevant to our decision, to the Secretary. We see no time limit on applications brought under that escape valve section.

Shaw, 750 F.2d at 1465. The IAM to this day has not done so and, thus, the amendment still has not taken effect.

Following our decision, the parties to *Shaw* submitted, apparently on their own initiative, a program of compliance with the *Shaw* judgment. The defendants agreed to apply prospectively the living pension feature to all participants who, like Shaw, had retired prior to January 1, 1977, and to also reimburse those retirees for the past adjustments they were entitled to but did not

receive. *See* ER 9-10. The parties, however, agreed that these measures would be taken with respect to the pre-January 1, 1977 retirees only—the class of litigants in *Shaw*—and not to any other retirees. They then requested the district court to confirm the essential portions of the program of compliance, which it did by issuing an order outlining the program.[3] The trustees continued to apply the ineffective amendment to Meagher and others who were not *Shaw* litigants. This, of course, was in violation of section 1054(g)(1). The trustees could not legally apply the amendment to anyone until it had taken effect by virtue of the Secretary's approval.

The trustees disclosed the *Shaw* litigation to the plan beneficiaries in a letter dated February 14, 1986. The letter stated, "Please note that *the judgment applies only to pensioners who retired before January 1, 1977, and their beneficiaries.*" (Emphasis in original.) Ten days later, Meagher wrote to one of the trustees asking why the *Shaw* judgment did not also apply to him. The trustee wrote back, simply reiterating the trustees' previous position that the *Shaw* ruling applied only to those who retired prior to January 1, 1977.

About two months later, on May 13, 1986, Meagher filed this action in federal district court. He claimed that the application of the amendment to reduce his accrued benefits violated section 1054(g)(1) of ERISA as determined by *Shaw*. He sought a declaratory judgment that the application of the amendment was a violation of ERISA and a judgment ordering the trustees to pay

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[3] The order states that the remedy is limited to the *Shaw* litigants. This is not surprising. The order could apply only to those litigants before the court in that case. That the effect of the order was limited, however, certainly does not mean that the effect of our decision was so limited. Any agreement between the *Shaw* litigants and the Plan and its trustees that purported to bind pensioners who retired *subsequent* to January 1, 1977 would not be binding upon such pensioners. They are not part of the *Shaw* litigants class.

to him the amount of benefits he is entitled to receive without application of the amendment.

The parties filed cross-motions for summary judgment, and the district court granted the defendants' motion. It did so on the basis that the applicable statute of limitations under ERISA, 29 U.S.C. § 1113, barred Meagher's action. Meagher appealed. We exercise our jurisdiction under 28 U.S.C. § 1291 (1982). Our review is *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

II

The statute of limitations, 29 U.S.C. § 1113, provides as follows:

> § 1113. Limitation of actions
>
> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

To apply the limitations period, we must first isolate and define the underlying violation upon which Meagher's claim is founded. The district court proceeded on the assumption that the violation in this case was the enactment of the amendment. It noted that Meagher had to have been aware of the amendment at least by October 10, 1979 because the trustees sent a letter on that date to all plan participants explicitly informing them of the amendment. The court explained, "At that time Meagher had knowledge of the events which gave rise to his cause of action." Applying the six-year period,[4] the court found that Meagher's time for filing suit expired in October of 1985, seven months before Meagher filed his action.

Meagher's cause of action accrued only when his accrued benefits were "decreased by an amendment of the plan, other than an amendment described in section 1082 (c)(8) of this title." 29 U.S.C. § 1054(g)(1). The district court suggests that passage of the inoperative amendment, or when Meagher found out the amendment was passed, was the precise accrual date. We disagree. Meagher was harmed only by the wrongful *application* of the amendment. Only then were his accrued benefits *decreased*. The passage of the amendments was not a violation of ERISA; an amendment must be adopted before it may even be submitted to the Secretary for approval.[5]

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[4] It is unclear why the court applied the six-year period to commence from Meagher's knowledge of the amendment. Knowledge of the violation or breach commences the three-year period. *See* 29 U.S.C. § 1113(a). However, this point is irrelevant to our analysis because we find that the district court erred in identifying the underlying violation.

[5] Section 1082(c)(8) is structured such that an amendment submitted to the Secretary must already meet the criteria outlined in subsection (A), (B), and (C). Subsection A refers to amendment which "*is adopted* after the close of such plan year" (emphasis added). Thus, amendments submitted to the Secretary must have been adopted, not simply proposed.

III

Meagher's claim is brought under 29 U.S.C. § 1132 (a)(1)(B) (1982), which provides:

> A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

ERISA charges the trustees and fiduciaries with the duty to administer the pension plan "in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. § 1104 (a)(1)(D) (1982).

Despite our holding in *Shaw*, the trustees have continued to apply the inoperative amendment to all but *Shaw* litigants. This is a denial of benefits to which Meagher was, and will become entitled and with respect to which he seeks "to recover . . . [and] to enforce his rights under the terms of the plan . . . ." 29 U.S.C. § 1132(a)(1)(B). Each check issued to him an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with ERISA, as required by 29 U.S.C. § 1104 (a)(1)(D). A separate cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action.

The limitations period is six years from the breach or violation, or three years from Meagher's knowledge of the breach or violation, whichever is earlier. 29 U.S.C. § 1113(a). We have held that the "statute of limitations is triggered by [a claimant's] knowledge of the

transaction that constituted the alleged violation, not by [his] knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). Each time Meagher received a check, he had knowledge of the transaction, though he may not have known at the time that the reduction in benefits was unlawful under ERISA.

Thus, the issuance of each check commenced a six-year period and Meagher's receipt of the check commenced a three-year period. Since the three-year period expires earlier, it is the one we apply. 29 U.S.C. § 1113(a)(2). Meagher brought this action on May 13, 1986. To determine how many breaches are actionable, we calculate three years back from May 13, 1986. Meagher's claims are thus timely for all checks issued since May 13, 1983. Meagher has stated timely claims under 29 U.S.C. § 1332 (a)(1)(B) to recover benefits due him under the Plan.[6]

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[6] Meagher also brought his action under 29 U.S.C. § 1132(a)(3) for equitable relief and damages. The Supreme Court in *Massachusetts Mutual Life Inc. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085 (1985), held that fiduciaries of a pension plan could not be held personally liable to a plan beneficiary for extra-contractual compensatory or punitive damages under 29 U.S.C. § 1132(a)(2) but did not reach the question of whether they could be liable under 29 U.S.C. § 1132(a)(3). Here, the claim against the fiduciaries individually was for failure to pay the benefits to which Meagher was contractually entitled under the pension plan. No basis for "extra contractual" damages or punitive damages was alleged.

Meagher has received the full relief allowable under the applicable limitations statute provided by 29 U.S.C. § 1132(a)(1)(B). His rights have been clarified and his rights to his pension, not decreased by the ineffective amendment, have been established. To the extent that such relief may also be embraced by 29 U.S.C. § 1132(a)(3), any declaration to that effect would be supererogatory.

CONCLUSION

In *Shaw*, we held that the amendment to the pension plan reduced accrued benefits and was inoperative until approved by the Secretary of the Treasury. No approval has since been obtained, and we hold that the amendment remains inoperative to all participants. Meagher's action for recovery of benefits is timely as to all benefits withheld since May 13, 1983 and as to the declaration of future benefits.

We reverse and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2312
D.C. No. CV-86-2435-SC

FRANK MEAGHER,
Plaintiff-Appellant,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; WILLIAM WINPISINGER, EUGENE GLOVER; and GEORGE KOURPIAS, as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Before: SNEED, HUG, and KOZINSKI, Circuit Judge.

ORDER

[Filed Dec. 1, 1988]

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Kozinski have voted to reject the suggestion for rehearing en banc, and Judge Sneed has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 86 2435 SC

FRANK MEAGHER,

Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, *et al.*,

Defendants.

JUDGMENT

[Filed May 28, 1987]

In accordance with the order entered by the court herein, it is hereby ordered, adjudged and decreed that:

(1) plaintiff's motion for summary judgment is denied; and

(2) defendants' motion for summary judgment is granted, and this action is dismissed.

Dated: May 22, 1987.

/s/ SAMUEL CONTI
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 86 2435 SC

FRANK MEAGHER,

Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, *et al.*,

Defendants.

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

[Filed May 28, 1987]

Plaintiff Frank Meagher ("Meagher") is a participant in a pension plan sponsored by the International Association of Machinists and Aerospace Workers ("Union"). He challenges an amendment to the plan which phased out and eventually eliminated a post-retirement benefit adjustment provision ("living pension"). He contends that the amendment denies him an accrued benefit in violation of section 204(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. 1054(g). This action is presently before the court on the parties' cross motions for summary judgment.

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment

motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. ——, 91 L.Ed.2d 265 (1986).

Defendants move for summary judgment on the basis of the statute of limitations. They argue that Meagher's action is governed by state statute of limitations, which is either three years in the District of Columbia or four years in the state of California. They claim that plaintiff's causes of action accrued at the latest on January 1, 1977, the date the amendment went into effect, and are therefore untimely.

The statute of limitations for a breach of fiduciary duty under ERISA is the earlier of (1) six years after the date of action or omission by the fiduciary, or (2) three years after the date plaintiff had actual knowledge of the breach, or on which a report from which he could reasonably be expected to have obtained knowledge was filed with the Secretary. 29 U.S.C. § 1113. If there is fraud or concealment, however, a plaintiff may bring his action not later than six years after the date of discovery of the breach or violation. *Id.* The statute of limitations is triggered by knowldege of the transactions that constitutes the alleged violation, not by knowledge of the law. *Blanton v. Anzalone*, 760 F.2d 989, 992 (1985).

Plaintiff's complaint is for breach of fiduciary duty under ERISA. Complaint, ¶ 10. Therefore, the applicable statute of limitations is six years.

The Union's pension plan was created in 1980 as a result of a merger of three predecessor staff pension plans. Affidavit of Eugene D. Glover ("Glover affidavit") ¶ 5. Prior to that, at the 1976 Union convention, the executive council of the Union submitted a proposed constitutional amendment which would, *inter alia*, phase out

the post retirement living pension of the three plans. *Id.* ¶ 13. This proposed amendment became effective January 1, 1977. *Id.* ¶ 14. In the spring of 1977, the Union distributed copies of the revised Union constitution, which included the pension plan revisions, to all members of the Union executive council and to all district and local lodges. *Id.* At the time, Meagher served as a member of the executive council and general vice president to the Union. Declaration of Frank Meagher in support of plaintiff's motion for summary judgment ("Meagher declaration") ¶ 2. On May 16, 1977, the Union submitted the pension plans to the Internal Revenue Service with a request for favorable determination letters. Glover affidavit ¶ 14. At the same time, the Union sent notice of the IRS filings to all plan participants with instructions how to protest the filings. *Id.* No one filed a protest. *Id.* On February 10, 1978, the IRS issued favorable determination letters for each plan. In February, 1979, as the Union began implementing the phase out, it sent letters to all retirees explaining how the amendment would affect them. *Id.* On October 10, 1979, the Union sent summary plan descriptions to all participants which explained the essential features of the plans and detailed the phase out of the living pension.

As a member of the executive council, plaintiff would have been aware in the spring of 1977 of the amendment phasing out the living pension amendment. In any case, by the Union's October 10, 1979 letter to all pension participants explaining the phase out of the living pension, plaintiff would have had knowledge of the phase out.

Meagher claims that although he knew that the Union was phasing out the living pension, he did not suspect that it was illegal to do so until December 1985, when he learned of litigation regarding the living pension, *Shaw v. International Association of Machinists and Aerospace Workers Pension Plan*, C 81 6076 AAH. Meagher further claims that the pension plan trustees concealed the ex-

istence of the litigation from him. Thus, Meagher argues, the statute of limitations did not accrue until December 1985. Meagher cites *Brock v. Nellis*, 809 F.2d 753 (11th Cir. 1987) in support of this proposition. In *Brock*, the Eleventh Circuit held that constructive knowledge, i.e. knowledge of facts sufficient to prompt an inquiry, which, if properly carried out, would have revealed the fiduciary breach, did not satisfy the "actual knowledge" required to commence the running of the statute of limitations. *Id.* at 755.

As discussed earlier, however, the Ninth Circuit has ruled that the statute of limitations is triggered by knowledge of the transaction that constitutes the alleged violations, not by knowledge of the law. *Blanton v. Anzalone*, 760 F.2d 989, 992 (1985). The Ninth Circuit is controlling authority. Thus, this court finds that the statute of limitations began to run at the latest in mid-October of 1979, when plaintiff received a letter from the Union explaining that it was phasing out the living pension. At that time, Meagher had knowledge of the events which gave rise to his cause of action. Therefore, the time for filing a complaint expired in October of 1985, before Meagher filed his complaint. Accordingly, the court grants defendants' motion for summary judgment. Because the court grants defendants' motion for summary judgment, it denies plaintiffs' motion for summary judgment.

In accordance with the foregoing, the court hereby orders that:

(1) defendants' motion for summary judgment is granted; and

(2) plaintiffs' motion for summary judgment is denied.

Dated: May 22, 1987.

/s/ SAMUEL CONTI
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C86-2435

Contract (Breach of Retirement Income Security Act)

FRANK MEAGHER,

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF, BACK PAY AND REFORMATION

[Filed May 13, 1986]

Plaintiff Frank Meagher, a participant in and beneficiary of a pension plan governed by the Employment Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. 1001 et seq., complains of defendants and alleges as follows:

JURISDICTION

1. The jurisdiction of this Court to grant declaratory equitable relief as well as damages is invoked pursuant to ERISA, 29 U.S.C., Sections 1132(a)(1)(B), 1132(a)(3)(B) and 1132(e)(1).

VENUE

2. Venue is proper in the United States District Court for the Northern District of California pursuant to 29 U.S.C. 1132(e)(2).

PARTIES

3. From late 1956 until his retirement on July 1, 1977, plaintiff was a member of the International Association of Machinists and Aerospace Workers ("the Union"). During such period of 20 years and 7 months, plaintiff was a participant in and prospective beneficiary of the defendant International Association of Machinists and Aerospace Workers Pension Plan ("the Plan"). Under the Plan plaintiff is now entitled to receive, and does receive, his pension benefits at his place of residence in Sebastopol in the Northern District of California.

4. Plaintiff is informed and believes that defendants Eugene Glover, William Winpisinger and George Kourpias are fiduciaries and trustees of the Plan. Defendant Plan can be found in the Northern District of California where the breach of defendants' duties hereinafter described has occurred.

5. From the time of the commencement of plaintiff's employment by the Union in 1956 until shortly before his retirement on July 1, 1977, a period of approximately 20 years, as an inducement to his continued employment during that period, the defendant Plan provided for a so-called "living pension" benefit increase after retirement to match the pay increases granted to persons holding the retiree's former job. The specific language of the Plan was as follows:

> "Pensions being paid to persons previously retired under this Act shall be adjusted by applying the appropriate foregoing percentage to the salaries for positions corresponding to those in which they were employed immediately prior to their retirement . . ."

6. The pension plan booklet distributed to all participants explained this calculation method as follows:

> "If, after your retirement, the salary for the position you held immediately prior to your retirement is changed, the amount of your pension will be adjusted accordingly."

7. Just prior to plaintiff's retirement, the Plan was amended by defendants, effective January 1, 1977, so as to gradually eliminate this provision over an eight year period, beginning January 1, 1979; defendants thereafter applied this amendment to all retirees.

8. The amendment above described violated the provisions of 29 U.S.C. 1054(g) in that it decreased the accrued benefits of plaintiff and violated the terms of his employment for over 20 years.

9. In Action No. CV 81 6076 AAH (Mx), in the United States District Court for the Central District of California, a member of defendant Plan who had retired prior to January 1, 1977, sought declaratory relief in a class action suit to prevent application of the amendment to himself and all those similarly situated. On July 15, 1983, the District Court ruled that the amendment of which plaintiff here complains was in violation of ERISA (*Shaw* v. *International Association of Machinists and Aerospace Workers Pension Plan*, 563 F. Supp. 653). A copy of the order confirming actions to be taken by the defendants is attached hereto as Exhibit A. The United States Court of Appeals for the Ninth Circuit affirmed this judgment on January 11, 1985, (50 F.2d 1458) and certiorari was denied by the United States Supreme Court on June 3, 1985 (105 S.Ct. 2678). On remand to the District Court, it was stipulated between plaintiffs and defendants, effective January 3, 1986, that judgment in the case would apply only to individuals in the class which had retired prior to January 1, 1977, thus omitting plaintiff who had retired six months later on July 1, 1977.

10. The adoption of the amendment to the Pension Plan above described was a breach of the fiduciary duty defendants owed to plaintiff in that the adoption of the amendment was not for the sole and exclusive benefit of the participants and beneficiaries, but rather served solely the purposes of the sponsoring entity; such amendment is a breach of the agreement between defendants and plaintiff, and the amendment is therefore arbitrary and capricious and voidable by this court.

11. Plaintiff has made demand of defendants that they pay plaintiff the benefits due him as if the amendment effective January 1, 1977, had not been adopted, and as per the judgment in *Shaw*, supra, but defendants have refused and continue to refuse to pay plaintiff such benefits.

12. As a direct and proximate result of the application of this amendment to plaintiff, plaintiff has suffered and continues to suffer a substantial financial loss, in an amount which thus far exceeds $80,000. Plaintiff will seek leave of this Court to amend this Complaint to state a precise damage figure when the same can be ascertained.

13. As a further direct and proximate result of the application of the aforesaid amendment, plaintiffs have been required to incur attorney's fees in pursuing this action. Plaintiffs will seek leave to amend this Complaint when said amount has been ascertained.

WHEREFORE, plaintiffs respectfully request that this Court:

1. Enter a judgment declaring that the amendment of the Plan, effective January 1, 1977, and the subsequent practices of the defendants with respect to plaintiff's pension benefits are in violation of the laws of the United States, and are arbitrary, capricious and in breach of defendants' fiduciary duties to plaintiff;

2. Issue its declaratory judgment ordering defendants:

(a) To pay to plaintiff the amount of money in pension benefits he would have received without application of the said amendment, together with interest thereon from the dates on which such benefits would have accrued but for the amendment;

(b) To reform the Plan so that the aforesaid amendment is not applicable to participants such as plaintiff who worked for 20 years prior to January 1, 1977, in reliance that their pension benefits would be those prior to the amendment effective January 1, 1977;

3. Award plaintiff punitive damages in a sum commensurate with defendants' financial circumstances and the willfull nature of defendants' breach of their fiduciary duties to plaintiff.

4. Retain jurisdiction over this action and order defendants to report periodically on defendants' progress in compliance with the terms of this Court's order;

5. Award plaintiff the costs of this action together with such attorney's fees as may be appropriate under 29 U.S.C. 1132(g); and

6. Grant such other and further relief as may be proper.

Dated: May 9, 1986

BROBECK, PHLEGER & HARRISON

By /s/ Paul N. McCloskey, Jr.
PAUL N. MCCLOSKEY, JR.
Attorneys for Plaintiff

STATUTORY APPENDIX

ERISA Section 204(g):

(g)(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in Section 302(c)(8) or 4281.

ERISA Section 302(c)(8):

(8) For purposes of this part, any amendment applying to a plan year which—

(A) is adopted after the close of such plan year but no later than 2½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances, shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 303(b)) and that

waiver under section 303(a) is unavailable or inadequate.

ERISA Section 413:

(a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation * * * except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA Section 502(a):

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary,

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

No. 88-1427 (2)

Supreme Court, U.S.
FILED
MAR 30
JOSEPH F. SPANIOL, CLERK

In The

Supreme Court of the United States

October Term, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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LIST OF PARTIES

The parties to the preceeding below were the Petitioners, the International Association of Machinists and Aerospace Workers Pension Plan, William Winpisinger, Eugene Glover and George Kourpias as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan, and the Respondent, Frank Meagher.

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No. 88-1427

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October Term, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

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v.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 856 F.2d 1418. The opinion and judgment of the District Court for the Northern District of California is unreported. Both opinions, as well as the appellate court's unreported denial of rehearing, are reproduced in the appendix to Petitioners' Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq., are pertinent to this matter.

ERISA Section 204(g), 29 U.S.C. § 1054(g);
ERISA Section 302(c)(8), 29 U.S.C. § 1082(c)(8);
ERISA Section 413, 29 U.S.C. § 1113;
ERISA Section 502(a), 29 U.S.C. § 1132(a)

The texts of these provisions are set forth in the statutory appendix bound with petitioners' petition at pp. 24a-26a.

STATEMENT OF THE CASE

Respondent Frank Meagher was, from late 1956 until his retirement on July 1, 1977, a member and officer of the International Association of Machinists and Aerospace Workers ("IAM"), and during such period of twenty years and seven months, was a participant in and prospective beneficiary of Petitioner International Association of Machinists and Aerospace Workers Pension Plan ("the Plan"). The Plan, as an employer, administered an employee pension plan for its officers, organizers and support staff. The Plan contained a "living pension" feature that increased the monthly benefit payments proportionately to any future salary increases of the position from which the pensioner had retired.

An amendment to the Plan was proposed in September, 1976 by the delegates to that year's IAM convention which had the effect of phasing out the "living pension" feature. The phase-out was scheduled to commence on

January 1, 1979 and continue until the entire living pension feature was eliminated by January 1, 1985.

Shortly after the implementation of the phase-out, in February, 1979, the Plan's trustees sent a letter to all retirees explaining the effect of the amendment upon their benefits. Eight months later, in October, 1979, the trustees sent a second series of documents, consisting of a document entitled "Summary Plan Description" to all Plan participants, describing how the living pension feature was being phased-out. The cover letter stated that the Pension Plan had "been revised to comply with the Employee Retirement Income Security Act of 1974 (ERISA) . . . ", and that the Plan had been amended "to comply with ERISA".

Edward Shaw, a Plan participant and a union retiree, filed a class action suit on December 1, 1981 in Federal District Court against the Plan and its trustees, challenging the application of the amendment phasing out the living pension. The class, certified by the court, consisted of Shaw and other retirees who had retired on or before January 1, 1977. The *Shaw* litigation resulted in a declaratory judgment for plaintiff Shaw on May 9, 1983 in *Shaw v. IAM and A.W. Pension Plan*, 563 F.Supp. 653 (C.D. Cal. 1983). The District Court's decision was affirmed by the Ninth Circuit Court of Appeals on January 11, 1985 in the decision entitled *Shaw v. International Association of Machinists and Aerospace Workers' Pension Plan*, 750 F.2d 1458, 1459-60 (9th Cir. 1985), and the Plan's petition for a Writ of Certiorari was denied by the Supreme Court on June 3, 1985 and reported in 471 U.S. 1137 [105 S.Ct. 2678] (1985).

Following the affirmance of the Ninth Circuit Court of Appeals, the parties to *Shaw* submitted, on their own initiative, a stipulated program for compliance with the District Court's decision. The parties to the stipulation agreed to apply prospectively the living pension feature to all participants who, like Shaw, had retired prior to January 1, 1977, and to also reimburse those retirees for the past adjustments they were entitled to but did not receive. The parties further agreed that these measures would be taken with respect to the pre-January 1, 1977 retirees only, presumably because only these individuals were the class of litigants in *Shaw*. The District Court was then requested to confirm the essential portions of the program of compliance, which it did by issuing an order outlining the program.

On February 14, 1986, the Plan trustees disclosed the result of the *Shaw* litigation for the first time to Plan beneficiaries. In a Letter on that date, the Plan trustees advised all Plan participants that "the judgment applies only to pensioners who retired before January 1, 1977, and their beneficiaries". Respondent Meagher, within ten days of his receipt of this letter, sent a letter to one of the trustees asking why the *Shaw* judgment did not also apply to him. The trustees' responsive letter provided no additional information other than that previously set forth in the February 14, 1986 letter.

On May 13, 1986, Respondent Meagher filed a complaint in Federal District Court, claiming that the application of the amendment to reduce his living pension accrued benefits was a violation of Section 1054(g)(1) of ERISA, as determined by the decision of the court in the *Shaw* case. Respondent's complaint further alleged that

the adoption of the amendment to the Pension Plan was a breach of the fiduciary duty petitioners owed to respondent and that the amendment violated the provisions of 29 U.S.C. § 1054(g) as determined by *Shaw*. Respondent therefore sought a declaratory judgment that the application of the amendment was a violation of ERISA and sought an order directing the Plan to pay to respondent the amount of money in pension benefits he would have received without application of the amendment to the Plan.

The answer to the complaint filed by the Plan denied that the amendment, as applied to respondent, violated ERISA. Affirmative defenses were also alleged, including that the action was barred by the applicable statute of limitations; that respondent was equitably estopped from bringing the action based on his alleged support of the phase-out; and that respondent had failed to exhaust available internal union remedies.

Cross-motions for summary judgment were filed, with petitioners seeking summary judgment on the issue of the statute of limitations and respondent seeking summary judgment in his favor on the merits.

On May 22, 1987, the United States District Court for the Northern District of California (by the Honorable Samuel J. Conti) granted the petitioners' motion for summary judgment on the issue of the statute of limitations and denied respondent's motion for summary judgment. Judge Conti cited the decision of the Ninth Circuit in *Blanton v. Anzalone*, 760 F.2d 989, 992 (1985), as controlling authority for his finding that respondent had knowledge in mid-October, 1979 of the events which would give rise

to his cause of action, and that a six year statute of limitations was triggered at that time. The court therefore found that respondent's time for filing a complaint expired in October of 1985, approximately seven months before he filed his complaint.

Respondent timely appealed from the District Court's decision to the United States Court of Appeals for the Ninth Circuit. In an opinion dated September 12, 1988, the Ninth Circuit reversed the judgment of the District Court.

The decision of the Court of Appeals rested squarely on its finding that the Plan trustees, despite the clear holding of the Ninth Circuit Court of Appeals in *Shaw, supra,* had continued to breach their fiduciary duty to respondent by failing and refusing to either bring the proposed amendment into compliance with ERISA, or abandon the amendment and restore to all Plan participants the living pension features which the proposed Plan amendment phased out. Based on its finding that the decision in *Shaw* was equally applicable to respondent's case, the Court of Appeals next addressed the applicable statute of limitations which would affect the amount of benefits respondent was entitled to.

The Court of Appeals, noting the inappropriateness of the District Court's use of the six year statute of limitations set forth in 29 U.S.C. § 1113(a)(1), applied the three-year statute of limitations period set forth in 29 U.S.C. § 1113(a)(2). Accordingly, the Court held that the limitations period dated three years from respondent's receipt of each benefit check. Based on the filing date of the action on May 13, 1986, the Court calculated three

years back and held that respondent's claims were timely for all checks issued since May 13, 1983. In so doing, the Court eliminated from recovery all benefit checks respondent received from the date of the implementation of the reduction of the living pension benefits until the May 13, 1983 limitations period commencement date.

Appellant petitioned for rehearing with suggestion for *en banc* review, and on December 1, 1988 the petition for rehearing was denied and the suggestion for a rehearing *en banc* was rejected. By timely petition filed on March 1, 1989, petitioners filed their Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

REASONS FOR DENYING THE WRIT

The instant decision of the Ninth Circuit, reaffirming its decision in *Shaw* and unequivocally ruling that the Plan amendment reduced accrued benefits and was, and still is inoperative until approved by the Secretary of the Treasury is a decision which brings to an end the inequitable and unauthorized activity of the Plan in denying benefits to one class of Plan participants solely on the grounds that they were not members of the *Shaw* class of litigants. The application of the three-year statute of limitations set forth in 29 U.S.C. § 1113(a)(2) to respondent's complaint is, contrary to petitioner's attempt to confer great importance on this application, ancillary to the principal holding of the Court of Appeals.

The Ninth Circuit's ruling in this matter is not in conflict with the rulings of any other circuits and, contrary to the strident "doomsday" assertions of petitioners, the decision will have no adverse impact on the administration of employee benefit plans throughout the United States. On the contrary, the Court's decision clarifies for Plan administrators their fiduciary responsibility to Plan participants to comply with the provisions of ERISA with respect to any proposed Plan amendments.

The Court's decision further preserves for Plan participants the right to challenge illegal or unauthorized amendments, but limits the recovery participants can obtain through such challenges to the constraints imposed by the applicable statute of limitations. The limitation of recovery to the three or six year statutory time period precludes the dire consequences predicated by petitioners, while at the same time discourages Pension Plan administrators from adopting illegal or unauthorized amendments and, three to six years after the adoption of those amendments, barring any future claims by pensioners whose rights may not have vested during the initial three to six years of the unauthorized amendment's operation.

I. THE PLAN TRUSTEES, IN THIS PETITION, HAVE MISCHARACTERIZED THE GRAVAMEN OF THE NINTH CIRCUIT COURT OF APPEALS DECISION, AND HAVE ATTEMPTED TO SHIFT THE FOCUS OF REVIEW FROM THE TRUSTEES' CONTINUED VIOLATION, DESPITE THE NINTH CIRCUIT DECISION IN *SHAW*, OF ERISA REQUIREMENTS FOR PENSION PLAN AMENDMENTS THAT REDUCE ACCRUED BENEFITS, TO THE ANCILLARY ISSUE OF THE STATUTE OF LIMITATIONS.

The arguments set forth by petitioners are rife with mischaracterizations of the facts of the case before the lower court, the applicable law, and the intent of the ruling of the lower court.

Petitioners argue that the Ninth Circuit Court's ruling that a cause of action seeking employee benefits pursuant to ERISA accrues each time a benefit check is issued "that fails to include the full amount claimed to be due . . . effectively has eliminated as a defense against such claims the running of the statute of limitations." (Petition at page 11.) Petitioners further assert: "By so ruling, the Court has spurned the fundamental concept of American jurisprudence that a plaintiff be diligent in the prosecution of a complaint or face the consequence of a time bar." *Id.* Petitioners assert that this ruling, as they have described it, conflicts with the rulings of other circuits on the issue of when an ERISA cause of action accrues and on the question of which statute of limitations is appropriately applied to ERISA founded benefit claims. (Petition at page 12).

Petitioners next cite an extensive string of cases which petitioners claim are decisions of other circuit

courts of appeals which are in conflict with the Ninth Circuit decision and which stand for the proposition that a plaintiff accrues a cause of action to obtain employee benefits when that plaintiff first learns that a Plan decision has been made that unambiguously and irrevocably has affected his benefit interests. (Petition at page 15).

This analysis, which is the foundation of the Plan's petition, is misleading in that it fails to address the single most salient distinction between the case at bar and any of the cases cited in support of the petition. This distinction is the fact that the proposed amendment was never legally adopted, and the issue of the legality of the challenged amendment to the Plan had already been determined in the *Shaw* litigation. Despite that fact, the trustees continued to refuse to pay respondent's benefits. That course of conduct by the Trustees constituted a continuing breach of petitioners' fiduciary responsibilities to respondent.

In discussing the basis for its decision in *Shaw*, the Ninth Circuit, in the Opinion which is the subject of the instant petition, reiterated its finding that the Plan had not met the criteria for the valid adoption of an amendment due to its failure to obtain the approval of the Secretary of the Treasury, as is required by 29 U.S.C. Section 1082(c)(8) (1982). This approval is required for all amendments which decrease accrued benefits; such amendments can only be adopted by a Plan if they are "necessary because of a substantial business hardship." *Id.* The Ninth Circuit noted further that "the trustees had not obtained the Secretary's approval by the time of the *Shaw* case, nor have they obtained it since." Based on the failure of the Plan to obtain this approval of the Secretary,

the Ninth Circuit Opinion concluded "[u]nder the plain language of Section 1082(c)(8), 'no amendment . . . which reduces the accrued benefits of *any* participant *shall take effect'* unless the Secretary approves it." (*Emphasis added*). Based on this analysis, the Ninth Circuit Court of Appeals reached the following conclusion with respect to the instant case: "The amendment is simply inoperative, and the Plan must be administered without giving any effect to the amendment". (Petitioner's Appendix, pp. 4a-5a.)

It is the failure of the Plan trustees to accept and adopt the ruling of the Court in *Shaw* which gives rise to the determination that claims can still be asserted for damages arising from that denial of benefits. As the Court notes in footnote 3 of its decision, discussing the limitations of the order signed by the District Court in the *Shaw* litigation, the limitations contained within that order are not binding on the Ninth Circuit Court of Appeals.

> "The order states that the remedy is limited to the *Shaw* litigants. This is not surprising. The order could apply only to those litigants before the court in that case. *That the effect of the order was limited, however, certainly does not mean that the effect of our decision was so limited."*

Petition at 6a, fn.3, *emphasis added.*

In the paragraph in which the Court first asserts its ruling that each check issued to respondent in amounts reduced under the inoperative Plan amendment constitutes a fresh breach by the trustees which gives rise to a separate cause of action, the Ninth Circuit prefaces that

ruling by reiterating the significance of the trustees blatant refusal to apply the Court's decision in *Shaw* to all pensioners.

> "Despite our holding in *Shaw*, the trustees have continued to apply the inoperative amendment to all but *Shaw* litigants. This is a denial of benefits to which Meagher was, and will become entitled and with respect to which he seeks 'to recover . . . [and] to enforce his rights under the terms of the Plan . . . ,' 29 U.S.C. § 1132(a)(1)(b)".

Petitioners' Appendix at p. 9a.

Again, in its conclusion, the Ninth Circuit's Opinion reasserts the significance the trustees' violation of *Shaw* has on the Court's decision in the instant case.

> "In *Shaw*, we held that the amendment to the pension plan reduced accrued benefits and was inoperative until approved by the Secretary of the Treasury. No approval has since been obtained, and we hold that the amendment remains inoperative to all participants. Meagher's action for recovery of benefits is timely as to all benefits withheld since May 13, 1983, and as to the declaration of future benefits."

Petitioners' Appendix at p. 11a.

Petitioners characterize the logic of the Ninth Circuit Court of Appeals' Opinion with respect to the issuance of each reduced employee benefit check as a "wrongful application" of the Plan, as a "strained reading of ERISA", and based "on a logical non-sequiter". (Petition at 14, fn.16.) This is another mischaracterization of the decision and its underlying logic, both of which are clear and unambiguous. The Ninth Circuit's Opinion states that the proposed Plan amendment was invalid and inoperative in 1977 when it was initially proposed, in 1979

when it was implemented, in 1983 when the District Court so ruled in the *Shaw* case, in 1985 when the Court of Appeals affirmed the District Court's decision in *Shaw*, and that it remains invalid today. Since the proposed Plan amendment has *never* been valid or operative, it cannot be the cause of the harm done to respondent. Only the applications of this invalid and inoperative amendment could give rise to a claim, and each such application gives rise to a separate claim. (Petitioners' Appendix at 8a).

As the Ninth Circuit panel noted in its decision, the failure to comply with the ERISA requirement for approval by the Secretary of the Treasury means that the amendment did not take effect. The Court was therefore compelled to treat respondent's claim for benefits as one for a reduction of benefit checks without any basis for that reduction. Accordingly, the only issue left before the Court was the determination of the appropriate statute of limitations to determine the degree to which the Court would be entitled to go back and award benefits to respondent.

No case cited by Petitioners in its petition supports the proposition that the trustees of a pension plan governed by ERISA can propose an amendment, put it into effect without complying with ERISA, and then make that inoperative amendment binding against plan participants by virtue of the limitations period set forth in 29 U.S.C. Section 1113. No such case is cited by petitioners because no such case exists. The cases cited in the petition at pages 15-20 have no bearing on the case at bar as they do not involve the fact situation outlined above, and these decisions will in no way be adversely affected by this Court's denial of the instant petition.

Petitioners further mischaracterize the facts of this case when they argue that the Ninth Circuit is "confusing an action (the adoption or implementation of the disputed phase-out amendment) with its ministerial consequences (reduced pension checks)." (Petition at 23.) Petitioners further assert, in footnote 22, that "once a decision concerning a participant's benefits is made, the Plan's subsequent dealings with him are purely ministerial." *Id.*

It is the Petitioners, and not the Ninth Circuit Court of Appeals, who appear to be confused about the circumstances of this case. After proposing an invalid and inoperative Plan amendment in 1977, the trustees put that amendment into effect in 1979 and began reducing pension checks. After losing the challenge to the validity of the amendment in *Shaw, supra,* in 1983, the trustees vigorously opposed that District Court decision in the Ninth Circuit Court of Appeals, lost again, and petitioned this Court for certiorari, which was denied in 1985.

Following that denial and the creation of the stipulated plan for compliance with *Shaw,* the trustees then took the affirmative action of communicating with all Plan participants and advising those participants that the trustees were going to create two new and separate classes of pension recipients: the *Shaw* class of participants, who would continue to receive the living pension benefits in the future and who would be reimbursed for benefits not paid pursuant to that feature between 1979 and 1986, and all non-*Shaw* class participants, as to whom the Plan would continue to enforce the proposed amendment held invalid and inoperative by the Court in *Shaw.*

The decision to continue to withhold living pension benefits to non-*Shaw* litigation participants was not a ministerial act. It is not a decision made by computer. This decision involved far more than the printing of checks, and, in fact, evidenced a blatant disregard for the clear ruling of the Ninth Circuit Court of Appeals, which remained undisturbed by this Court, that the proposed Plan amendment was invalid, inoperative, and not binding on the participants in the Plan. There is nothing ministerial about this decision and the perpetuation of this wrongful decision has now been unequivocally rejected by the Ninth Circuit's Opinion.

One final mischaracterization by Petitioners of the facts of this case needs clarification. The petition, at pages 20-21, asserts that respondent Meagher was "fully aware from the outset that his benefit interest had been affected adversely by the 1977 amendment. . . . It is clear that he could have brought suit against the Plan as early as 1977. Certainly, Meagher could have done so, as the District Court noted, by the fall of 1979, when the Plan's summary descriptions were issued. By the issuance of those documents, the Trustees unequivocally renounced the future payment of 'living pension' adjustments. Meagher, instead, chose to wait more than nine years before pursuing his claim." *Id.*

What is missing from this description of the facts is a fact supplied by the Ninth Circuit Court of Appeals summary of the background of this case, as follows:

> "In October, 1979, the trustees sent Summary Plan Descriptions to all Plan participants, describing how the living pension feature was phased out. The cover

> letter stated that the Plan had been qualified by the IRS and had been revised to comply with [ERISA]."

Petitioners' Appendix at p. 3a.

Frank Meagher did not choose to wait nine years before bringing his action against the Plan. On the contrary, he refrained from filing a suit in reliance upon the representation by the Board of Trustees of the Plan that the Plan had been adopted in compliance with ERISA. As has been noted previously, this representation was false. Respondent Meagher only learned the truth of this representation in February, 1986 when the Plan first advised him and other Plan participants of the outcome of the *Shaw* litigation. To propose that respondent Frank Meagher spent nine years of his retirement willingly accepting seriously reduced pension benefits with full knowledge that he could challenge the Plan amendment which reduced those benefits is a gross mischaracterization of the facts of this case.

II. PETITIONERS' CHOICE OF LAW ARGUMENT WITH RESPECT TO THE APPLICABLE STATUTE OF LIMITATIONS IS, BY PETITIONERS' OWN ADMISSION, IRRELEVANT, AND IS ALSO MISDIRECTED, AS RESPONDENT MEAGHER'S CASE IS ONE FOR BENEFITS ARISING FROM A BREACH OF FIDUCIARY DUTY, AND THEREFORE SQUARELY WITHIN THE AMBIT OF ERISA SECTION 413.

Petitioners argue, at pages 23-25, that the Ninth Circuit Court of Appeals' decision to apply the three/six year limitations period set forth in ERISA Section 413 was

erroneous because other circuits have applied state limitations periods applicable to actions to enforce written contracts to employee benefit disputes. (Petition at 23-24.) Petitioners admit, however, that "it cannot be said that the final outcome of the instant litigation will turn on the issue of which of the arguably appropriate statutes of limitations should have been applied by the court below . . . ". Based on this admission, respondent requests that the Court deem this section of the petition as surplussage and disregard it.

Further basis to disregard this argument is that the complaint filed by respondent Meagher in the District Court was clearly one for damages arising from a breach of the fiduciary obligations of the trustees. (Petitioners' Appendix at 22a, paragraph 10.) The opinion of the Ninth Circuit Court of Appeals also states that the action of the trustees in issuing reduced benefit checks to respondent constituted a breach of their fiduciary obligation to him.

> "ERISA charges the trustees and fiduciaries with the duty to administer the pension plan 'in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with the provisions of [ERISA]'. 29 U.S.C. § 1104(a)(1)(d) (1982)."
>
> . . .
>
> "Each check issued to him an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with

ERISA, as required by 29 U.S.C. section 1104(a)(1)(d)."

Petitioners' Appendix at 9a.

Based on the Ninth Circuit's finding, pursuant to its authority to conduct a *de novo* review of the proceedings in the trial court (*See, e.g., Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986), that the actions of the Plan trustees constituted a breach of their fiduciary duties to respondent, the applicable statute of limitations is the six/three year provisions of 29 U.S.C. Section 1113, ERISA Section 413, and its application in the Opinion of the lower court provides no basis for valid argument by Petitioners.

III. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THE CASE AT BAR WILL NOT SERIOUSLY ADVERSELY IMPACT EMPLOYEE BENEFIT PLAN ADMINISTRATION OR UNDERMINE THE BENEFIT SECURITY OF PLAN PARTICIPANTS.

Petitioners' concluding argument, at pages 26-28, is a "doomsday" prediction that what Petitioners term the "continuing violation" concept they assert is announced by the Ninth Circuit Court of Appeals' decision will create tremendous uncertainty among employee benefit plan administrators regarding the viability of decisions relating to basic plan design issues, and will cause injury to Plan participants resulting from underfunding caused by the "belated nullification of a critical plan rule". (Petition at 27.) *Nothing* in the Ninth Circuit's Opinion will cause these dire results, and on the contrary, the Opinion

supports and reaffirms the legislatively determined appropriate limitations period for claims against plan administrators for breaches of fiduciary duty, as provided in 29 U.S.C. Section 1113.

It is only Plan trustees who implement proposed Plan amendments without meeting a clear condition precedent to adoption of such an amendment under ERISA, such as approval by the Secretary of the Treasury, and who then persist in the application of that proposed amendment despite adverse court ruling, who can expect to suffer financial consequences from such a course of action. While these consequences may be dire, a consideration of the harm done to Plan participants if petitioners' interpretation of the law is accepted will fully justify any harm suffered by the pension Plan in the case at bar.

If petitioners' argument in this case is correct, pension plans which propose illegal or unauthorized amendments to their benefit plans, and represent to their participants that those proposed amendments comply with ERISA, may, by lulling the participants' concerns over the validity of the amendments for three to six years, be able to circumvent the requirements of ERISA and preclude any subsequent plan participants, including those whose rights were not vested as of the date of the implementation of the unauthorized amendment, from ever challenging the validity or legality of that amendment. It is this result which the Ninth Circuit's decision prevents, while still applying the appropriate statute of limitations to valid claims challenging such unauthorized amendments.

Petitioners' argument that the Ninth Circuit decision spurns "the fundamental concept of American jurisprudence that a plaintiff be diligent in the prosecution of a complaint or face the consequence of a time bar" (Petition at 11), fails to acknowledge the serious consequences imposed by the statute of limitations, as interpreted by the Ninth Circuit, on respondent's claim. Respondent Frank Meagher, in his complaint, sought to recover all benefits pursuant to the living pension feature of his pension from 1979 through 1986, and thereafter. The Court of Appeals decision, limiting his cause of action to recovery of benefit checks reduced without authority from May 13, 1983 and thereafter, bars respondent Meagher from recovery of more than four years of improperly reduced benefit checks. The serious consequences of the statute of limitations on such ERISA claims is clearly reaffirmed by the Court's decision and Plan participants who wait years, or even decades, to file their claims will be forced to sacrifice benefits they might otherwise have been entitled to had they filed their claims at an earlier date. The Ninth Circuit Court of Appeals' decision will therefore have the salutory effect of encouraging the timely filing of claims, while at the same time precluding pension Plan administrators from using the statute of limitations as a shield to bar valid claims from being prosecuted.

IV. CONCLUSION

The requirements of ERISA provide fair and equitable guidelines for the amendment of pension plans. In particular, the requirement that approval be obtained from the Secretary of the Treasury for any amendments to

pension plans which reduce accrued benefits, and that such approval be granted only if the Secretary determines that the amendment is "necessary because of a substantial business hardship", (29 U.S.C. § 1082(c)(8) (1982)), is a requirement which guarantees that the drastic impact on plan participants resulting from reduction of accrued benefits is only implemented in the most serious of cases. In the case at bar, the Plan has, despite numerous opportunities, never obtained the approval of the Secretary of the Treasury for the pension Plan amendment it has enforced against certain of its participants for the past ten years.

The Ninth Circuit Court of Appeals, in its *Shaw* decision, attempted to bring an end to this unauthorized course of conduct. Regrettably, the Plan took advantage of the limitations of the class certified in the *Shaw* case, and interpreted the Ninth Circuit's decision in that case as being one limited to the particular class of beneficiaries represented therein. In its decision in the case at bar, the Ninth Circuit has clarified in unequivocal terms the invalidity of the proposed amendment and has properly applied the statute of limitations set forth in 29 U.S.C. Section 1113 to limit the extent to which respondent Frank Meagher is entitled to recover for the difference between the reduced benefit payments he received and the amount he would otherwise have been entitled to. The Ninth Circuit's decision is not in conflict with the decisions of any other circuits, as the decisions cited in Petitioners' brief are inopposite to the facts and the law applicable to the case at bar. No adverse consequences will result from the Ninth Circuit's decision insofar as pension plan administration is concerned, provided that

those administrators do not attempt to follow a course of violation of ERISA as has occurred in the instant case.

For the reasons set forth herein, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 88-1427 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE* SUPPORTING PETITION FOR WRIT OF CERTIORARI

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

American Society for Personnel Administration ("ASPA") moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae.*

This motion is necessitated by the failure of respondent Frank Meagher, upon request, to give consent to the filing of a brief by ASPA. Petitioner In-

ternational Association of Machinists and Aerospace Workers Pension Plan, *et al.* has consented to the filing of the accompanying brief.

ASPA's interest in this case arises from its position as the world's largest association of personnel and human resource professionals, representing nearly 40,000 members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

As the major association of the human resources profession, ASPA is vitally concerned with the orderly development of the law governing the private retirement system in the United States. ASPA has long advocated pension laws and regulations which adequately protect the rights and just expectations of workers while allowing plan sponsors and administrators to maintain flexibility in the design and operation of their pension programs.

ASPA views with alarm the possible adoption of a judicial theory of a "continuing violation" in the context of employee benefit law. Adoption of a continuing violation theory would endanger the future of employer-sponsored retirement programs, and the benefit security of plan participants, by imposing a never ending threat of liability upon plan sponsors, administrators and fiduciaries. This is a matter of broad concern transcending the immediate interests of the parties to the case at bar. Consideration of this matter from a broader perspective than those of the immediate parties will, it is hoped, be of substantial assistance to the Court.

ASPA therefore seeks leave to file a brief as an *amicus curiae* urging this Court to grant the Petition for Writ of Certiorari in the classical traditional sense: not to weigh in on one side or the other, but to try to further "the public interest in the administration of justice," *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575, 581 (1946), by ensuring that the Court is made fully aware of the context of decisions such as that in this case, and is alerted to the startling implications of the "continuing violation" theory. ASPA hopes both that such an exposition may be useful to the Court in deciding to review this case, and that the Court may find it appropriate to give the lower courts guidance in this respect. ASPA takes no position on the factual merits of the case at bar.

Respectfully submitted,

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March 31, 1989

QUESTION PRESENTED

Whether the Ninth Circuit, in creating a "continuing violation" theory of ERISA benefit claims by ruling that a separate and independent cause of action accrues each time an allegedly inadequate periodic benefit check is received, has undermined the intent of Congress by eliminating for all practical purposes a statute of limitations for participant claims under ERISA and thereby threatening the future of employer-sponsored retirement programs and the benefit security of plan participants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1427

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER AND GEORGE KOURPIAS AS FIDUCIARIES AND TRUSTEES OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE* SUPPORTING PETITION FOR WRIT OF CERTIORARI

Interest of the *Amicus Curiae*

The American Society for Personnel Administration ("ASPA") is the world's largest association of personnel and human resources professionals, represent-

ing over 40,000 members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

As the major association of the human resources profession, ASPA is vitally concerned with the orderly development of the law governing the private retirement system in the United States. ASPA has long advocated pension laws and regulations which adequately protect the rights and just expectations of workers while allowing plan sponsors and administrators to maintain flexibility in the design and operation of their pension programs.

ASPA is aware that employer-provided pensions, along with Social Security benefits and individual savings and asset income, comprise for many American families and individuals the "three-legged stool" of retirement income, and ASPA advocates the expansion of the private pension system to alleviate some of the reliance on Social Security. Essential to an expanded reliance upon the pension system is the maintenance of the finely tuned balance between protecting pension benefits for plan participants while limiting the costs to and restrictions upon plan sponsors, administrators, and fiduciaries.

ASPA is concerned that the ruling by the court below will upset the balance Congress has taken care to preserve by providing an overabundance of protection for participants while sacrificing virtually all consideration of the interests of the sponsors, administrators, and fiduciaries. ASPA is particularly con-

cerned that this imbalance of interests will ultimately harm all parties to the private retirement system. ASPA is also concerned that this imbalance will undercut the private pension system's status as a vital component of retirement income, and cause the Social Security system to become the primary source of retirement income for many individuals who otherwise would have been supported primarily by private pensions.

ASPA believes that the present case provides the proper vehicle for this Court to reaffirm the delicate balance drawn by Congress between the legitimate goals of encouraging private pension and welfare plans and protecting the legitimate rights of participants as well as ensuring the effectiveness of the system in providing retirement income security to employees.

Summary of Argument

The decision below raises an issue of great importance. As the Petitioner has expressed in its brief to this Court, the Ninth Circuit's ruling that a separate and independent cause of action accrues each time an allegedly inadequate periodic benefit check is received conflicts with decisions of the First, Fourth, Fifth and District of Columbia Circuits. Congress clearly understood that the operations of employee benefit plans are increasingly interstate, and thus designed the Employee Retirement Income Security Act of 1974 (hereafter "ERISA") to foster a uniformity of decision to assist administrators, fiduciaries and participants to

predict the legality of proposed actions.[1] The Ninth Circuit, by declaring *sua sponte* that a separate and independent cause of action accrues each time an allegedly inadequate periodic pension check is received,[2] conflicts with Congressional intent and its opinion should thus be reviewed by this Court in order to redress the conflicting interpretations of ERISA.

Of additional import to the Court's consideration of whether to issue a Writ of Certiorari is the grave legal and policy consequences which would be created if the decision below were unreviewed. If left undisturbed, the decision below would have the effect of burdening the interests of all those involved in the employee benefit system in order to grant a benefit to participants which the participants do not need. The statutory structure of ERISA and its rigid reporting and disclosure requirements leave no void which an open-ended period to bring legal action against a plan trustee could fill. These statutory requirements insured that the Respondent was at all times fully informed about the amount of his anticipated pension benefits and the basis for their computation. In addition, in comparison to other laws designed to protect employees, ERISA's statute of limitations period, commencing upon receipt of notification of a change in benefits, provides a very liberal amount of time for a participant to commence suit.

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[1] S.Rep. No. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865.

[2] The Respondent had argued that his limitation period was tolled until he learned that the action taken was illegal. The District Court had rejected this Contention; the Ninth Circuit, however, volunteered its own version of when the cause of action accrued.

Thus, ERISA already provides adequate time for a participant to safeguard his or her right to pension benefits. The Ninth Circuit's expansive interpretation of the period in which to commence suit, therefore, is not needed to ensure that pension benefits are protected.

The decision of the court below is improper as well as unnecessary, for it will cause injury to plan sponsors, administrators, fiduciaries, and even the plan participants themselves. As a practical matter, fiduciaries will be faced with a virtually never-ending liability. Fear of such liability may detrimentally affect their exercise of discretion and may cause reputable fiduciaries either to raise their rates substantially or to get out of the business altogether. Plan sponsors and administrators may be faced with widespread contingent liabilities. These liabilities could lead to underfunding of plans and to plan terminations, two of the very results which ERISA was designed to prevent. Such results may also lead to decisions to cut back on future contributions in order to fund the contingencies, or not to provide new or extended benefits. These outcomes run contrary to Congress' intent to make retirement plans more effective in providing retirement income for employees who have spent their careers in useful, socially productive work. These possibilities are not merely idle speculation or a parade of horrors designed to pique the interest of this Court. The decision below fundamentally attacks the notions of certainty and security which were the foundations of ERISA. Speculations about the ultimate harm visited upon our private pension system is appropriate as well because of the vast sums of

money involved and the potential for never-ending litigation directed toward reaching that money.

In addition, were it to be followed, the lower court's ruling could have a detrimental effect upon the Social Security system. Those who otherwise would have benefited from fully funded, operational, ample private pensions might be forced to rely completely or to a greater extent upon Social Security benefits. Such increased reliance by these millions of Americans would cause the Social Security system to be what Congress never intended it to be—the primary source of retirement income.

In view of the fact that the lower court ruling will harm plan sponsors, administrators, fiduciaries, and participants and contravene the intent of Congress—in return only for providing a luxury to the already well-protected participants—ASPA urges this Court to grant the Petition for a Writ of Certiorari in order to review and overturn the flawed decision of the Ninth Circuit.

Argument

A. The Decision Below Ignores Congressional Intent in Order to Provide the Privilege of a Virtually Limitless Statute of Limitations Period to Already Well-Protected Plan Participants Who, by Virtue of Stringent ERISA Disclosure Laws and Generous ERISA Statute of Limitations Provisions, Already Have the Ability to Adequately Safeguard Their Rights Under the Plan.

We believe the conflict presented in this case should be resolved by this Court favorably to the Petitioners, for the alternative is effectively to provide the already well-protected Respondent, and other plan partici-

pants affected by the Ninth Circuit decision, with an added and unnecessary benefit which runs directly contrary to Congressional intent.

Before ERISA was enacted, a participant often received no information regarding the plan, or was given information which was incomprehensible to him due to the technicalities and complexities of the language used.[3] Therefore, a participant might have had no awareness of the effect of a plan decision upon his or her benefits until several years after the decision was made. Since the impact of a trustee's decision could lie buried for years before it emerged to the detriment of a participant, it might well have been inequitable to confine the participant to a limited number of years following the decision in which to challenge it.

However, under ERISA, plan administrators and trustees now face extensive reporting and disclosure requirements.[4] Detailed information regarding plan fiduciaries, plan provisions, claims procedures, and participants' remedies must be distributed to participants and beneficiaries in the form of a summary plan description (the "SPD"). The SPD must be set out "in a manner calculated to be understood by the average plan participant, and . . . [must be] sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and ob-

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[3] S.Rep. No. 127, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4847; H.R. Rep. No. 533, 93d Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4646.

[4] 29 U.S.C. §§ 1021-1027, 1059.

ligations under the plan."[5] Any material modifications in the terms of the plan or changes in the SPD must also be distributed in the same way.[6] In addition, participants and beneficiaries must receive copies of certain statements submitted as schedules to the plan's annual report.[7] Furthermore, a participant is entitled to request and receive from the plan administrator a statement of the participant's accrued benefits and nonforfeitable benefits.[8] Finally, a participant may also be protected from confusion regarding an administrator's statements about the plan; a sponsor or administrator may be bound by his other statements regarding the plan which are contrary to the plan provisions.[9]

In addition to the information required to be distributed to participants and beneficiaries, ERISA also demands the filing of additional information with the

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[5] 29 U.S.C. § 1022.

[6] *Id.*

[7] 29 U.S.C. §§ 1021(a)(2), 1024(b)(3), 1023(b)(3)(A), (B).

[8] 29 U.S.C. § 1025.

[9] The terms "employee pension benefit plan" and "pension plan" are defined as a plan, fund, or program established or maintained by an employer or by an employee organization, or both, which by its express terms "*or as a result of surrounding circumstances*" meets the requirements set forth in the definition. 29 U.S.C. §1002(2) (emphasis supplied). *See Ogden v. Michigan Bell Telephone Co.*, 595 F.Supp. 961, 970 (E.D. Mich. 1984) (Section 1002(2) suggests that there may be circumstances in which employer representations and employee expectations define the terms of the benefit plan beyond the language in the document creating the plan).

appropriate federal agencies and the retention of records.[10]

With all of the extensive disclosure and reporting requirements established by ERISA, the potential for a participant to be unaware for several years of a plan decision or its detrimental ramifications upon his or her benefits is highly unlikely. The participant is given ample opportunity to police his or her own rights effectively.[11]

But even with such full disclosure, ERISA does not require the participants to rush to court. Rather, the statute's expansive statute of limitations provides ample time for an aggrieved participant to bring an action to protect his or her rights.[12] Indeed, the drafters' understanding of the complexity of pension issues led them to provide a bi-level statute of limitations. The statute permits an action with respect to a fiduciary's breach of duty to be commenced at any time up to

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[10] 29 U.S.C. §§ 1023, 1059.

[11] S.Rep. No. 127, 93d Cong., 2d Sess. 27, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4863 (intent to ensure that "participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.").

[12] In fact, this time period greatly exceeds the time periods allowed for the commencement of suits under other employment-related statutes. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (Title VII employment discrimination suits—must file civil action within ninety days from receipt of formal right-to-sue letter from EEOC); 29 U.S.C. § 255(a) (Fair Labor Standards Act and Equal Pay Act—complaint must be filed within two years of alleged violation); 29 U.S.C. § 626(e) (Age Discrimination in Employment Act—same time period as applicable to Fair Labor Standards Act).

the earlier of

(1) six years after . . . the date of the last action which constituted a part of the breach or violation, or . . .

(2) three years after the earliest date . . . on which the plaintiff had actual knowledge of the breach or violation. . . .

29 U.S.C. § 1113. The language of the statute makes clear that there is an obligation on the part of the informed participant to police the administration of his or her plan; Congress clearly intended that the participant have a substantial period of time in which to bring an action, but by no means was this time period intended to be unlimited.

By interpreting ERISA to start the limitations clock each time a fixed benefit check was received, the Ninth Circuit effectively nullified the intent of Congress to establish a fixed, albeit generous, statute of limitations. Since ERISA already provided for ample disclosure to participants and ample time for such participants to commence suit, participants' ability to police the plan has already been adequately safeguarded. The interpretation of the court below provides no benefit other than a mere luxury to the Respondent which Congress did not intend to bestow.

B. The Decision Below Threatens to Penalize Plan Sponsors, Administrators and Fiduciaries and Ultimately Jeopardize All Participants' Benefits, and Thus Undercuts the Intent of Congress to Secure Retirement Benefits and Encourage the Maintenance and Growth of the Employee Benefit System.

This Court has noted that, in enacting ERISA, Congress clearly desired to ensure that "if a worker has

been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733 (1980). As part of the desire to protect a worker's anticipated benefits, Congress sought to prevent the termination of pension plans before sufficient funds have been accumulated in the plans. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 2713 (1984).

Congress was also aware that employers would not create, maintain, or enhance pension plans if ERISA proved too restrictive or costly. Therefore, in order to protect present benefits and to encourage the creation of new benefits, Congress also intended that the requirements it imposed by enacting ERISA be uniform, reasonable, and non-oppressive.[13]

The ramifications of the decision below could seriously undermine all of the salutary public policy concerns mentioned above, both for the Petitioners and for all sponsors, administrators, and fiduciaries of plans which may be challenged under the theory espoused by the Ninth Circuit. By effectively ruling that any decision by a plan sponsor, trustee, or adminis-

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[13] H.R. Rep. No. 533, 93d Cong., 2d Sess. 1,2,9, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4640, 4647; 120 Cong. Rec. 29198 (1974) (Statement of Rep. Ullman); *Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 843 (D.C. Cir. 1984) *cert. denied*, 469 U.S. 880, 105 S.Ct. 245 (1984); *Michigan United Food and Commercial Workers Unions v. Baerwaldt*, 572 F.Supp. 943, 949 (E.D. Mich. 1983), *rev'd on other grounds*, 767 F.2d 308 (6th Cir. 1985); *cert. denied*, 474 U.S. 1059, 106 S.Ct. 801 (1986).

trator that arguably affects a participant's benefit is forever subject to judicial challenge, the Ninth Circuit has destroyed the finality essential to the provision of promised benefits.

This Court is aware that determining the amount of contributions that must be made to ensure sufficient funding of a plan is a complex and difficult procedure.[14] Risks which are foreseeable may be built into the formula to ensure benefit security; however, the occurrence of unforeseeable contingencies can render ineffective even the most painstakingly prepared formula. Amounts carefully determined and set aside to cover contingencies prior to the Ninth Circuit's ruling now may prove to be painfully inadequate, and the amount of reserves required in the future for contingent liabilities may be impossible to fix. As this Court has noted, such unforeseen contingencies may jeopardize the solvency of the plan and, thus, the participants' benefits:

> The harm would fall in large part on innocent third parties. If . . . the [contingency is] recovered from the pension fund, the administrators of the fund will be forced to meet unchanged obligations with diminished assets. If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated re-

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[14] *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721, 98 S.Ct. 1370, 1382 (1978).

duction in the contributions of past employees.[15]

Thus, an inadequate reserve could result in a current retiree's anticipated benefits being reduced or eliminated by the outcomes Congress intended to prevent—the underfunding of a plan, or even the termination of a plan, due to insufficient assets.

Active employees, in addition to suffering these same risks, may also find that Congress' intent to encourage the future growth of the pension system has also been undermined, and that they have been victimized as a result. Based on the Ninth Circuit's decision, employers who may have contemplated establishing additional or expanded benefits may now completely reject or drastically scale down such new benefits, because of either their limitless exposure under current plans or their potential exposure with respect to the new benefits. Under the Ninth Circuit's ruling, a beneficiary far into the future—having just received his or her 120th monthly pension check, for example—may decide to bring an action challenging the action of the trustees a decade earlier. And even if the challenge is eventually defeated, plan assets will have been squandered in judicial proceedings devoted to the resurrection of actions taken in the dim past.

The threat of never-ending exposure to judicial challenge may disrupt the responsible decision-making required of trustees, perhaps encouraging them to be

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[15] *Id.* at 722-723, 98 S.Ct., at 1382-1383; *see also Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1109-1110, 103 S.Ct. 3492, 3512-3513 (1983) (O'Connor, S., concurring).

overly conservative to the detriment of the plan's participants and beneficiaries. Also, reputable trustees may understandably consider it worthwhile to remain trustees only upon the assurance of significantly increased fees or expensive insurance coverage which would greatly and unnecessarily increase administrative costs to the plan. In the alternative, uncertainty may cause reputable trustees to get out of the business altogether, leaving those sufficiently disreputable as to be unconcerned about administering the plan in accordance with ERISA. In any of these scenarios, it is clear that current and future plan participants may be harmed by the practical consequences of the Ninth Circuit's ruling.

The decision's primary impact will, of course, be upon those private pensions plans which may be challenged in the Ninth Circuit and their participants, sponsors, administrators, and fiduciaries. This is but little comfort, for a staggering number of retirees and active employees may be affected by the decision. For example, over four million individuals of retirement age reside in the Ninth Circuit.[16] These individuals represent over ten percent of the entire population in the Ninth Circuit.[17] In addition, the Ninth Circuit includes the four states with the largest percentage increases in individuals of retirement age in the last decade.[18] These figures indicate that millions of retirees reside in the Ninth Circuit, and their numbers are growing faster than in any other location in the

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[16] American Association of Retired Persons, A Profile of Older Americans 1988, p.8.

[17] *Id.*

[18] Alaska, Arizona, Hawaii, and Nevada. *Id.*

United States. Those retirees residing in the Ninth Circuit who rely in any respect upon a private pension will be directly affected by the Ninth Circuit's ruling. Although the individuals affected may be considered to have received a benefit in the form of a limitless period to file suit, such benefit is illusory; in exchange for granting these retirees a limitless time period in which to sue, the Ninth Circuit is taking away the certainty that plan funds will actually exist to meet their economic expectations for retirement.

Nor is the decision below necessarily limited to those currently residing in the Ninth Circuit. Retirees and active employees living outside the Ninth Circuit whose employers have business ties to the Ninth Circuit may also be affected. Because of the requirement for uniform administration of pension plans, the impact of the decision below will spread nationwide due to the overriding demographic and geographic influence the Ninth Circuit has on our pension system.[19]

C. The Decision Below Could Undermine Congressional Intent by Causing the Social Security System to Be the Primary Source of Retirement Income for Millions of Americans Who Otherwise Would Have Been Supported Primarily by Private Pensions.

In addition to the detriment to the sponsors, administrators, fiduciaries, participants, and employees

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[19] Given the multitude of corporations which have offices in several locations within the United States, and the likelihood that many of such corporations have pension plans covering participants in all offices, the number of people residing outside the Ninth Circuit who may be directly affected by its ruling is likely to be quite substantial. As Congress has noted, "the operations of employee benefit plans are increasingly interstate." S.Rep. No. 127, 93d Cong., 2d Sess. 29, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865.

mentioned above, the opinion below could undermine Congress' intent regarding the Social Security system. "The metaphorical 'three-legged stool' of retirement income consist[s] of social security, employer-provided pensions, and individual savings. . . ."[20] It is only logical that if one leg is weakened, shortened, or removed, more reliance must be placed upon the remaining two legs. Those individuals whose anticipated employer-provided pensions are reduced or eliminated by the Ninth Circuit ruling may now have to rely more upon their Social Security benefits to provide their income at retirement. The decision below, then, could cause the Social Security system to become something which Congress clearly did not intend it to be—the primary source of retirement income for the majority of Americans. This direct conflict with yet another intent of Congress is one more reason why the decision of the Ninth Circuit is clearly a step in the wrong direction.

Conclusion

The decision below could gravely hobble the ability of employers to provide economic security to employees in their aging years. Those employers who could afford to do so could find it exceedingly difficult to find a reputable trustee with whom to work, for few would be willing to assume the unlimited trustee liability which the lower court's ruling would create. The decision below thus undermines Congress' clear intent to provide retirement income security to employees through private pensions. It also undercuts Congressional intent by creating the potential for the

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[20] Borzi, *A National Retirement Income Policy: Problems and Policy Options*, 19 U. Mich. J. L. Ref. 5,8 (Fall 1985).

Social Security system to become the primary source of retirement income for a majority of Americans. For all of the foregoing reasons, this Court should grant Petitioners request for a Writ of Certiorari and the judgment of the Ninth Circuit should be reviewed and reversed.

Respectfully submitted,

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No. 88-1427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS *as fiduciaries and trustees of the* INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN, *Petitioners,*

v.

FRANK MEAGHER, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.* In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of counsel for the Respondent to consent to the filing of a brief *amicus curiae* by the Chamber.

2. The Chamber is a federation of approximately 180,000 companies and several thousand other organizations, such as state and local chambers of commerce and trade and professional organizations. It is the largest association of business and professional organizations in the United States.

3. The Chamber regularly represents the interests of its member-employers in important employment and labor relations matters, vitally affecting those interests, before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation. E.g., *Trans World Airlines Inc.* v. *The Independent Federation of Flight Attendants*, —— U.S. ——, 57 U.S.L.W. 4283 (1989); *Laborers' Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979).

4. The instant case presents a precedent-setting issue of critical concern to the business community—*i.e.*, for the purposes of ERISA does the issuance of each monthly benefit check to a pensioner give rise to a new cause of action for additional benefits, and thus commence anew the running of the statute of limitations. Specifically, the Court must determine whether the applicable statute of limitations under ERISA, 29 U.S.C. § 1113(a), is to be expunged from the statute by allowing plaintiffs to challenge decisions made by plan trustees decades after these decisions have been made.

5. This issue is of vital concern to the Chamber and all its member-employers. The *sua sponte* decision

by the Ninth Circuit effectively dismantles the statute of limitations provisions of ERISA by holding that each pension check for a lesser amount issued to a plaintiff constitutes a fresh breach by the plan trustees, with the statute of limitations period running separately for each cause of action. The net result of this holding is that each pensioner can maintain a cause of action until his death.

6. The Ninth Circuit's decision in this matter represents a radical departure from what the Chamber, and its member employers, have understood to be well-settled principles with regard to limitations on actions under ERISA. If this decision is left intact, employers will never again be able to act with reasonable certainty that the decisions they make with regard to their pension plans will at some point cease being subject to challenge.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of the Petitioner, International Association of Machinists and Aerospace Workers Pension Plan.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Ninth Circuit erred in creating a "continuing violation" theory of ERISA benefit claims by ruling that a separate and independent cause of action for employee benefits accrues, and a plaintiff's limitations period again begins running, each time an allegedly inadequate periodic benefit check is issued.

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

The interests of the Chamber of Commerce of the United States (the "Chamber") in this matter are set forth in the accompanying Motion for Leave to File Brief as *Amicus Curiae.*

STATEMENT OF THE CASE

This action was brought by Respondent Frank Meagher in the United States District Court of California pursuant to the Employee Retirement Income Security Act of 1974, as amended (hereafter "ERISA").

The International Association of Machinists and Aerospace Workers (hereafter the "Pension Plan" or "Plan") is a defined benefit pension plan sponsored by the International Association of Machinists and Aerospace Workers, AFL-CIO. In this case, the trustees of the Plan eliminated a very costly provision known as the "living pension" provision. This provision gave each pensioner an automatic increase in pension payments proportionate to any salary increase for the position from which the pensioner retired. Meagher, the former General Vice President of the union, and a member of its executive council, retired on July 1, 1977. As an active member of this executive council, Meagher was aware in the Spring of 1977 that the Plan had adopted the amendment eliminating the living pension provision. In addition, he, along with the other Plan participants, received written notice of the change in October of 1979.

Meagher filed an action challenging the elimination of the living pension provision. The applicable statute of limitations under ERISA, 29 U.S.C. § 1113(a), provides that any such action must be brought within six years from a breach or violation, or three years from the plaintiff's knowledge of the breach or violation, whichever is earliest. The Plaintiff filed his action on May 13, 1986 —well after the expiration of both possible statutes of limitation.

The District Court dismissed Meagher's claim on the grounds that the statute of limitations had run. On appeal, however, the U.S. Court of Appeals for the Ninth Circuit reversed. Instead of focusing on the date of the breach or on the date of Meagher's knowledge of the

breach, the lower court focused on the CONSEQUENCES of the alleged breach itself. The court, in a *sua sponte* decision, held that each pension check issued to the plaintiff "constitutes a fresh breach by the trustees . . . a separate cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action." 856 F.2d 1418, 1423 (9th Cir. 1988).

On December 1, 1988, the Ninth Circuit denied the Plan's petition for rehearing for *en banc* review.

SUMMARY OF ARGUMENT

The petition for writ of *certiorari* must be granted in this case because the Ninth Circuit's decision represents a novel and irrational departure from the long accepted interpretation of the ERISA statute of limitations. The lower court has effectively ignored the notion that limitation periods are a fundamental element of the American system of law, serving to protect both potential defendants, and the integrity of the judicial system itself.

Under the Ninth Circuit's application of the continuing violation theory, plaintiffs can maintain a cause of action as long as the consequences of the alleged breach remain in effect. This represents a dramatic change in how the theory is generally applied under other employee protective statutes where the focus is upon the time of the alleged act—not upon the time when the consequences of the act become painful. The practical effect of this decision is to create a sense of perpetual instability in the employee benefit system. Decisions regarding plan rules will remain forever subject to challenge, and employers will never have the security of knowing that their plans have been adequately funded. In a system that demands certainty, the Ninth Circuit has created uncertainty.

Finally, by eliminating the statute of limitations as a defense in actions challenging benefit decisions, the lower court is effectively increasing the burden on an already overloaded federal court system. Statistics indicate that

the federal court system is saddled with an overwhelming number of ERISA civil actions, and the dismantling of the time bar will only make the demands on the judicial system more onerous. Thus, for this reason, and those previously noted, a writ of *certiorari* must be granted.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE *SUA SPONTE* DECISION BY THE NINTH CIRCUIT UNDERMINES THE TRADITIONAL SENSE OF STABILITY THAT IS PROVIDED BY TIME LIMITATION STATUTES

Time limitations for causes of actions are an integral part of the American system of law. These limitations have been of exceptional importance to the legal system since ancient times, as they define the time periods following the accrual of the right of action in which a litigant must assert his claim. The lower court's *sua sponte* decision, thus, has the frightening effect of dismantling the statute of limitation contained in 29 U.S.C. § 1113(a)—*i.e.*, of dismantling the limitations period intended to be included in the ERISA statute by Congress.

Although limiting the individual's right to pursue a legal action may, to some degree, seem harsh, statutes of limitation serve to protect three sets of interests vital to defendants and to society in general. The first, and primary, focus of the protection awarded by such a statute is fairness to the potential defendant.[1] By specifying a time period after which parties are no longer liable for a specific cause of action, statutes of limitation prevent parties from being subject to indefinite threats of lawsuits.[2] Essentially, these statutes serve as notice to a po-

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[1] *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 Southwestern Law Journal 895, 897 (1987).

[2] There should be a time when the slate is "wiped clean of ancient obligations." *Special Project: Time Bars in Specialized Federal Common Law*, 65 Cornell Law Review 1011, 1016 (1980).

tential defendant of how long to preserve the information necessary to maintain a defense.

In the present case, the Ninth Circuit's decision completely ignores the importance of providing the party with such repose. The Ninth Circuit's continuing violation theory creates a sense of absolute uncertainty with regard to long-term plan liability. As a result of this decision, employers will never have the security of knowing that their plan has been adequately funded. In a situation that demands financial certainty, the lower court has created uncertainty.

Time limitation statutes also serve a second purpose—they preserve the integrity of the judicial system by allowing courts to focus on fresh claims.[3] In effect, the adoption and application of a statute of limitation prevents further overloading of an already burdened legal system.[4] A pensioner's ability to maintain a perpetual cause of action alleging inadequate pension payments only serves to saddle the court system with an even heavier load of ERISA civil actions. (See, infra p. 10 for statistics on the number of ERISA actions filed in the Federal court system).

Thirdly, society in general derives great benefit from the implementation and enforcement of time limitations.[5] Time bars preserve an employer's ability to engage in the regular course of business transactions, which, in turn, leads to greater stability in commercial relations.[6]

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[3] Statutes of limitation relieve courts "of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett* v. *New York Central RR*, 380 U.S. 424, 428 (1965).

[4] *Determining Limitation Periods*, at p. 898.

[5] *Id.*

[6] The legislative history supports the notion that retention of freedom in financial decision making is vital to the functioning of a pension plan. *Employee Retirement Income Security Act of 1974: Hearings on S. 4 Before the Senate Labor and Public Welfare Committee*, 93rd Cong., 4850 (Apr. 18, 1973).

Instead of providing such stability, however, the lower court's decision undermines the soundness in commercial relations that time bars are designed to protect. Employers must have the assurance that their decisions affecting benefit plans will, *at some point*, cease being subject to challenge. That is, that these decisions will become *final* and *binding*. Without such knowledge, employers will never be able to adequately fund their pension plans, thus compromising the notion of benefit security.[7]

II. THE LOWER COURT'S DECISION REPRESENTS A RADICAL DEPARTURE FROM THE WELL-SETTLED PRINCIPLES CONTROLLING THE APPLICATION OF THE CONTINUING VIOLATION THEORY UNDER OTHER EMPLOYEE PROTECTIVE STATUTES

The lower court's decision rests on a fundamental error in the application of the continuing violation theory to the instant case.[8] What the Ninth Circuit does is to create a continuing violation concept that allows a plaintiff to maintain a cause of action as long as the CONSEQUENCES of the alleged illegal pension decision remain in effect. In this case, the consequences of the plan trustee's decision to eliminate the living pension provision are alleged to occur each month upon receipt

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[7] Congress has never required employers to establish pension plans. By subjecting employers to indefinite liability for plan funding decisions, the Ninth Circuit is essentially providing a disincentive for employers to establish plans.

[8] In the Title VII area, the "continuing violation" concept is applied to modify the normal statute of limitations period in situations where an employer's discrimination exists prior to and during the limitations period. Crivens, *The Continuing Violation Theory and Systemic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 Vanderbilt Law Review 1171, 1172 (1988). The scope of the theory was first defined by this Court in the Title VII area in *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

of a pension check in a lesser amount. This represents a sweeping change in how the theory is generally applied under other employee protective statutes, for it goes beyond modifying the limitations period to ignoring the time bar completely.[9]

The Ninth Circuit's application of the continuing violation theory violates the fundamental principle established by this Court that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become painful." *Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980), quoting *Abramson* v. *University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979). In *Delaware State College*, the Court evaluated the application of the continuing violation theory in the context of alleged discrimination in tenure decisions stating that, "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure—the eventual loss of teaching position—did not occur until later." 449 U.S. at p. 258.

Thus, this Court has been clear in its direction that a plaintiff cannot resurrect a stale claim simply by alleging that the consequences of an employer's decision constitute a separate cause of action. See, *Chardon* v. *Fernandez*, 454 U.S. 6 (1981).[10]

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[9] The continuing violation theory is generally limited to a series of related ACTS (emphasis added)—one of which falls within the limitations period. B. Schlei and P. Grossman, *Employment Discrimination Law*, 1047 (1982).

[10] Lower court decisions are consistent in affirming this notion that a present violation must occur within the limitations period before the continuing violation theory is triggered. *Hill* v. *AT&T Technologies, Inc.*, 731 F.2d 175, 179 (4th Cir. 1984) (". . . such an argument assumes that an allegation of a continuing violation constitutes a talismanic or shibboleth term automatically relieving a

These principles developed by the Court defining the scope of the continuing violation theory are not limited to the context of Title VII discrimination actions. With regard to actions under 42 U.S.C.A. sections 1981 and 1983, the lower courts have stressed the importance of identifying when "the reprobated act occurred." *Perez* v. *Laredo Junior College*, 706 F.2d 731, 734 (5th Cir. 1983).

Actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, have also adopted this same approach. In *Price* v. *Litton Business Systems*, 694 F.2d 963, 965 (4th Cir. 1982), the Fourth Circuit embraced the rationale of *Delaware State College*, holding that the "filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, *regardless of when the effects of that decision come to fruition.*" (Emphasis added.)

Along these same lines, in suits brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging denial of fair representation, courts have avoided applying the continuing violation theory to revive a valid, but non-cognizable, unfair labor practice charge. In fact, in *Metz* v. *Tootsie Roll*, 715 F.2d 299, 305 (7th Cir. 1983), the Seventh Circuit described the use of the continuing violation theory as follows:

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claimant of any obligation to comply with the statutory time requirements . . ."); *Milton* v. *Weinberger*, 645 F.2d 1070, 1075 (D.C. Cir. 1981) ("the continuing violation theory is limited to either a series of related acts, one of which falls within the limitations period or to the maintenance of a discriminatory system into the limitations period"); *Woodward* v. *Lehman*, 717 F.2d 909, 915 (4th Cir. 1983) ("only where ACTUAL VIOLATION (emphasis added) has occurred within the requisite time period . . . that the continuing violation theory is sustainable . . ."); *Cox* v. *United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969) ("while plaintiff's most obvious injury occurred prior to the charge-filing period, there was another independent act of discrimination within the charge filing period.")

> . . . rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in receiving a legally defunct unfair labor practice."

See also, *Adams* v. *Budd Co.*, 846 F.2d 428, 432 (7th Cir. 1988), cert. pending (. . . even if there was a continuing violation, only complaints based upon conduct occurring within the six month proceeding are considered timely. . . .")

Finally, the continuing violation theory has been applied with this same care in the context of "whistleblower" actions under the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851(b)(1). The Fourth Circuit has held that ". . . the time of the challenged conduct is its notification rather than the time its painful consequences are ultimately felt . . ." *English* v. *Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988).

As these cases under other employee protective statutes indicate, a statute of limitation should not be rendered sterile through the application of the continuing violation theory. That is, a plaintiff should act in conformance with the well established rule of law that a cause of action accrues—and a limitations period commences running—when the violation occurs and not when its adverse aftereffects are first felt.[11] Without such conformance, time bars become merely ceremonial, and employers become subject to indefinite financial liability for the consequences of their actions.

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[11] For purposes of ERISA, a benefit claim generally accrues, triggering the limitations period, at the time a claim for benefits is denied. In limited situations, courts have determined that an action accrues from the time plaintiff had actual knowledge of the adverse action. See, Brief for Petitioner at 13-21, *International Association of Machinists and Aerospace Workers Pension Plan* v. *Meagher*, No. 88-1427 (March 1, 1989).

III. THE NINTH CIRCUIT'S DECISION WILL ONLY INCREASE THE WORKLOAD OF AN ALREADY OVERBURDENED FEDERAL COURT SYSTEM

Given the number of ERISA cases that continue to flood the federal court system, the role of time limitations on such actions demands great emphasis. For it is these time bars that act in promoting fairness for all potential parties to a suit.[12] In 1988, 6,704 ERISA civil actions were filed in the courts.[13] This is compared with 5,735 actions filed in 1986 and 4,502 actions filed in 1984.[14] Thus, this represents approximately a fifty percent growth in the number of actions commenced under ERISA in a four-year period.

Even more striking is the fact that, in 1988, ERISA actions accounted for over half of the suits commenced under all the federal labor statutes.[15] The demands of ERISA suits on the federal court system are already apparent, and the lower court's interpretation of 29 U.S.C. § 1113(a) would only serve to make this burden more onerous.

Moreover, unless this Court grants petitioner's writ of *certiorari*, and re-evaluates the Ninth Circuit's interpretation of 29 U.S.C. § 1113(a), plaintiffs will feel no pressure to file their action within the appropriate limitations period. Such a situation is not only inherently unfair to employers who must make their plan funding decisions based on economic realities, but is also inherently unfair to a federal court system already suffering under a load of ERISA civil actions.

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[12] This is consistent with the historical perspective on time limitations as preserving the integrity of the judicial system. *Supra*, note 3.

[13] *Statistics on ERISA Cases Filed During Years Ended June 30.* Administrative Office of the United States Courts, Statistical Analysis & Reports Division (unpublished).

[14] *Id.*

[15] *Reports of the Administrative Office of the U.S. Courts on Civil Cases Commenced by Nature of Suit* (1988), Table C-2A.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant the petition for writ of *certiorari*.

Respectfully submitted,

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Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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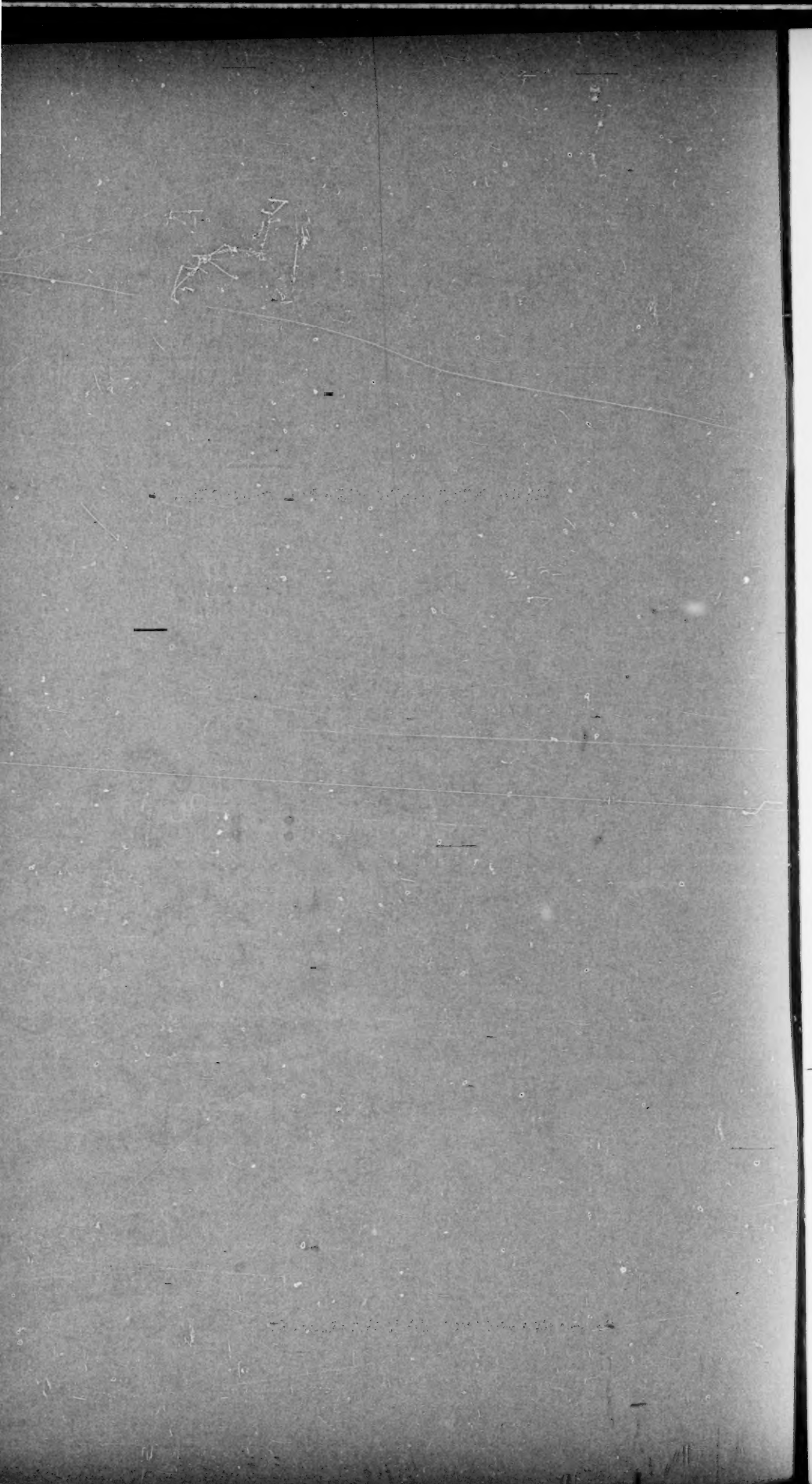

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1427

INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, *et al.*,
Petitioners

v.

FRANK MEAGHER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the American Academy of Actuaries ("the Academy") hereby moves the Court for leave to file the accompanying brief as Amicus Curiae in support of the Petition for Writ of Certiorari filed on March 1, 1989 in No. 88-1427.

In support of the motion, the Academy states as follows:

1. The motion is necessitated by the failure of Respondent ank Meagher, upon request, to give consent to the filing a brief by the Academy. Petitioner International Associa- n of Machinists and Aerospace Workers, et al., has con- nted to the filing of the accompanying brief.

2. The American Academy of Actuaries is a non-profit ganization whose membership consists of approximately 000 actuaries across the United States. The Academy has one of its major functions the providing of advice and counsel public policy decision makers and to the courts on issues here actuarial issues are raised.

3. The Academy is an interested party because it is con- erned that the decision of the Ninth Circuit below may have erious adverse effects on defined benefit pension plans roughout the country and upon the ability of actuaries to per- rm their statutory duties effectively. The Academy therefore oves for leave to file the attached brief to assist the Court's onsideration of the actuarial dimension of the issue presented.

4. The Academy is uniquely situated to provide information nd analysis regarding the actuarial implications of this case. HEREFORE, the Academy respectfully requests leave to e the accompanying brief as amicus curiae.

Respectfully submitted,

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ated: March 30, 1989

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Motion of the American Academy of Actuaries for Leave to File an Amicus Curiae Brief in Support of Petitioners was served by first class mail, postage prepaid, this _____ day of March, 1989, to the following parties of record:

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Academy of Actuaries submits this brief, amicus curiae, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, in support of Petitioners in No. 88-1427.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The American Academy of Actuaries (the "Academy") is a national professional organization of actuaries which was

formed in 1965 to bring into one organization actuaries of all specialties within the United States, and to seek accreditation and greater public recognition for the profession. Its main focus is the social, economic, and public policy environment in which the actuarial profession functions. Primary activities include liaison with federal and state governments, relations with other professions, the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice.

In order to join the Academy, prospective members must satisfy rigorous education and experience requirements. The current membership is approximately 9,000. The Academy estimates that almost 90% of those who could join have joined the Academy.

Actuaries are an indispensable element in the functioning of pension plans, particularly in areas of plan design, administration, and financing. Actuaries must satisfy regulatory requirements propounded by the Joint Board for the Enrollment of Actuaries, pursuant to Section 3042 of the Employee Retirement Income Security Act ("ERISA") in order to engage in practice pursuant to that statute (to become "enrolled actuaries.") More than 85% of all enrolled actuaries are represented within the Academy's membership.

Enrolled actuaries are authorized to make annual certifications required by Section 103(a)(4) of ERISA, and, most importantly for the instant matter, to certify the minimum funding level of defined benefit pension plans under Section 303 of ERISA.

The Academy is deeply concerned about the effect of the Ninth Circuit's decision below on defined benefit plans, upon the pension system as a whole, and upon the actuarial profession's ability to undertake its responsibilities under law.

Because of the importance of clarifying the role of actuaries in future pension plan administration, the Academy respectfully prays that the petition for certiorari filed by the International Association of Machinists ("IAM" herein) be granted.

II. STATEMENT OF THE ISSUE

Whether the Ninth Circuit erred in creating a "continuing violation theory" of ERISA's statute of limitations (29 U.S.C. Section 1113)[1] under which a plaintiff's limitations period begins running each time an allegedly inadequate benefit check is issued.

III. STATEMENT OF THE CASE

Frank Meagher, respondent herein, was an officer of the International Association of Machinists and Aerospace Workers ("IAM") for 20 and one-half years prior to his retirement on

[1]The statute (Section 413 of ERISA) states as follows:

> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of-
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could have reasonably been expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

July 1, 1977. The IAM, as an employer, sponsored a defined benefit pension plan, in which Meagher was fully vested prior to his retirement. One feature of the plan was a so-called "living pension" feature which provided retirement benefit increases proportional to those provided to the position from which he had retired.

In September, 1976, the trustees acted to amend the plan and phase out the "living pension" feature. In February, 1979, soon after the plan's trustees commenced the phase out, a letter was sent to all retirees explaining the phase-out. A Summary Plan Description was distributed in October 1979 which again described the phase-out of the benefit.

On December 1, 1981, a plan participant, Edward Shaw, filed a class action claiming that the phase-out was illegal. The district court agreed with the claim. *Shaw v. IAM Pension Plan,* 563 F. Supp. 653 (C.D. CA 1983), which was affirmed by the Ninth Circuit in *Shaw v. IAM Pension Plan,* 750 F.2d 1458 (9th Cir., 1985), *cert. denied,* 471 U.S. 1137 (1985), finding that the "living pension" feature was a part of the accrued benefit which could not be decreased without the approval of the Secretary of the Treasury, which had not been therein obtained.

Meagher initiated the instant action on May 13, 1986. The district court granted the defendants' motion for summary judgment, finding that the action was barred by the applicable statute of limitations under ERISA 29 U.S.C. Section 1113. The Ninth Circuit reversed, and Petitioners have sought review by this Court.

IV. ARGUMENT

A. Review by the Supreme Court is Needed to Resolve Ambiguity in the Application of the Statute of Limitations.

As long as a question remains regarding the applicability of the statute of limitations, actuaries will be faced with needless and unnecessary uncertainty. The function of the enrolled actuary of a pension plan under ERISA is to provide appropriate estimates of annual funding requirements, based on a careful analysis of existing liabilities, plan investment return, and future trends in salaries, retirement, marriage, morbidity and mortality. To the extent that existing liabilities cannot be ascertained with a degree of certainty, these calculations become less reliable. In the absence of a clear understanding regarding the operation of a statute of limitations, actuaries will lack assurance that possible errors committed more than three years (or six years, if appropriate) before can be safely and appropriately ignored. As a result, the analysis of liabilities and funding requirements will become less certain. The Supreme Court should therefore review the case and articulate a bright line when a right to initiate an action accrues, and when that right is extinguished.

The decision below results in what can be appropriately denominated as a "rolling" statute of limitations. For purposes of certainty, the statute of limitations needs to be identified as commencing when an error or omission takes place giving rise to a cause of action (or when the claimant receives notice of that error or omission), and not from the time when the consequence of that error or omission arises or becomes apparent to the potential claimant. To find otherwise would result in endless ambiguity regarding the applicability of the statute of limitations, and invite considerable litigation growing out of

situations where a claimant is aware of grounds for a claim, but chooses to sit back and wait to determine whether ensuing developments might increase the odds for success.[2]

In a related area, actuaries, although not plan fiduciaries, nevertheless can be subjected to suit for alleged malpractice. Such threats to the personal liability of actuaries are also faced by other pension professionals, including attorneys, accountants, plan administrators and trustees. At present, it is very difficult for such professionals to obtain appropriate professional liability insurance, due in large part to the lack of certainty which is inherent in their undertakings. Extension of the statute of limitations increases the potential period of claims (creates a "long tail") for which insurers are even more hesitant to provide coverage. The lack of insurance coverage can have the effect of forcing the pension professional to act in a more conservative manner than the facts and circumstances of the assignment might dictate.

B. The Supreme Court Should Review the Case To Preserve the Effect and Function of the Statute of Limitations

One purpose of a statute of limitations is to allocate responsibility between parties for finding and eliminating errors which may arise in the functioning of a dynamic system such as pen-

[2]Hypothetically speaking, the claimant in this case could have had actual notice of the attempted plan amendment eliminating the "living pension" feature of the plan when the attempted amendment was made. By delaying a claim, he would have failed to place the trustees on notice of their error, and the trustees would not have seen the need for seeking the Secretary's approval for their action. By delaying the claim, the claimant would in such an instance have enhanced his eventual recovery by failing to raise the claim in a timely manner, an action precisely at odds with the theory of a statute of limitations.

sion plans. As in all dynamic systems, errors can take place which affect benefit levels of participants. In a system such as the modern American defined benefit pension system with the almost annual legislative changes and continuing complex regulatory promulgations, such errors are not infrequent.

Plan participants and beneficiaries receive annual reports on plan decisions and on their own benefits. In view of the burden-sharing intention of the statute of limitations, it is submitted that at least some of the burden should be placed on participants to promptly bring to the attention of plan sponsors and administrators errors which may have arisen. Promptness in bringing such matters to the attention of those with funding decision responsibilities is needed to assure appropriate funding determinations.[3]

It is fundamental to actuarial science that stability is necessary in funding pension plans. The statute of limitations provides a time limit upon which to base calculations and estimates. Elimination of the statute of limitations is detrimental to orderly plan funding. Many errors made by plans are relatively small; however, if recovery is not "cut off" by a statute of limitations, relatively small errors can grow to significant amounts over time, through the accumulation of erroneous payments and the compounding of interest on those payments. It is therefore not in the interest of a stable pension system to permit uncertainty regarding the statute of limitations.

---

[3]It should be noted that the statute of limitations can also serve to protect the interests of plan beneficiaries. For example, if a plan erroneously overpays a beneficiary as a result of administrative error, the plan is constrained by the statute of limitations to limit its recovery to the three year period denominated by the statute, as measured from the time of the error.

C. Uncertainty Regarding the Statute of Limitations Could have a Negative Effect on Retirement Income Security.

Uncertainty regarding the statute of limitations can have an immediate and negative impact on retirement income security by reducing the level of plan funding. In the plan at issue here, funding levels were prescribed by the constitution of the employing union[4] and hence could not be quickly changed as is the case with many employer-provided pension plans. In fact, in most collectively bargained plans, contribution levels are fixed for the length of the agreement period.

In the case at hand, plan funding levels were established based on the belief that the plan amendment eliminating the "living pension" feature had been effective. When subsequent litigation established that the amendment was ineffective for benefits accruing after January 1, 1977, the plan's funding level was suddenly discovered to be much lower than had been assumed. Because there is a finite amount of money available through contributions to pay for benefits, when a benefit which the trustees had assumed to be eliminated is suddenly reimposed, the plan's funding level becomes inadequate. The statute of limitations is particularly appropriate in this kind of situation because a failure by the Respondent to put the trustees on timely notice exacerbated plan underfunding for many years.

---

[4]The 1977 Constitution of the employer stated as follows in Article XIV, Section 9:

> ...After December 31, 1976, the contributions shall be 30% of the salaries of all of the persons employed in all of the positions covered by this Plan..."

Increased uncertainty resulting from an uncertain statute of limitations increases the need for the actuary to utilize appropriate safety margins for adverse experience. When such margins are increased due to greater uncertainty, beneficiaries are likely to receive smaller benefits than they would otherwise receive.

Uncertainty regarding the statute of limitations could also lead to an increase in lump sum cash outs when pensions become payable. At the present time, benefits from defined benefit plans are most frequently distributed as lifetime annuities to the beneficiary (and frequently to a surviving spouse as well). Plan sponsors would wish to limit their potential liability for errors arising during the lengthy period of annuity distributions over the lifetime of beneficiaries.

As a result, they would seek to provide immediate lump sum cash payments, thereby eliminating the lengthy period of time within which an error might grow. The use of lump sum settlements is contrary to appropriate pension policy, because it transfers to the beneficiary the investment risk and management responsibilities, and undercuts the goal of assured pension income throughout the lifetime of the beneficiary. In addition, lump sum payouts at retirement, although they cannot be mandated by the employer, can be encouraged through financial incentives. But retirees in such cases generally forego future benefits increases, in any, and often lose entitlement to retiree health benefits as well, when such benefits are tied to pension benefits.

D. Existing and Proposed Regulations Support the Theory of a Precise and Well-Articulated Statute of Limitations

The concept of a well-articulated and precise period within which claims need to be raised is not limited to Section 413

of ERISA. In light of the dynamic nature of pension plans, several other regulatory time frames have been adopted within which claims must be brought to the attention of plan sponsors or waived administratively. For example, the Pension Benefit Guaranty Corporation regulations appear in 29 C.F.R. 2606.5 and .33 provide a time limit within which to challenge benefit determinations.

In addition, the proposed regulations governing so-called "standard terminations" (52 F.R. 3318, September 2, 1987) discuss the requirement for notice of benefit commitment at the time of plan termination. Such notice is required to participants in pay status, or who have received benefits for less than one year.[5] As the preamble states, notice to employees who have received benefits for a year or more is not necessary, because they already had sufficient notice and time within which to contest the level of benefits they receive. To the extent that such a notice period is sufficient in that context, it is submitted that the longer statute of limitations of ERISA (three years) provides sufficient time, and needs no further extension by judicial interpretation.

[5]The preamble to proposed regulation Section 2616.1 states in part as follows:

> With respect to benefits of participants (or beneficiaries) in pay status as of the proposed termination date, Section 2617.14(d) requires that the personal data be provided only to participants (or beneficiaries) who were in pay status as of that date. Requiring that this information be provided to all persons in pay status could create a tremendous administrative burden in many plans. Moreover, it seems unlikely that, after one year, there would be outstanding questions as to a persons' correct benefit. (emphasis added).

V. CONCLUSION

Based upon the foregoing, it is respectfully requested that this honorable Court issue a a writ of certiorari to the Ninth Circuit Court of Appeals and affirm the request of Petitioners.

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MOTION FILED
MAR 31 1989

NO. 88-1427

IN THE

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OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN SOCIETY OF PENSION ACTUARIES TO FILE BRIEF AS AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The American Society of Pension Actuaries (ASPA) hereby moves the Court pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief as Amicus Curiae in support of the Petition for Writ of Certiorari filed on March 1, 1989, in 88-1427.

In support of the motion ASPA states as follows:

1. This motion is necessitated by the failure of respondent Frank Meagher, upon request, to give consent to the filing of a brief by ASPA. Petitioner International Association of Machinists and Aerospace Workers, et al. has consented to the filing of the accompanying brief.

2. ASPA is a non-profit corporation established under 501(c)(6) of the Internal Revenue Code. ASPA has 2,700 members, nationwide. Its members are pension actuaries, consultants and administrators who perform services primarily for retirement plans in the private sector.

3. ASPA is an interested party because its members will be adversely affected by the decision of the United States Court of Appeals for the Ninth Circuit in *Meagher v. International Association of Machinists and Aerospace Workers*, 856 F.2d 1418 (9th Cir. 1988). The Circuit Court's ruling that the issuance of each monthly benefit check gives rise to a new cause of action for benefits and hence commences anew the running of the participant's limitations period has severe negative implications for the administration and financial well-being of all employee retirement plans. No longer will plans have any assurance that a benefit decision is ever final and unchallengeable. ASPA believes that the ultimate impact of the Ninth Circuit's decision will be to undermine the financial stability of employee retirement plans and thereby reduce the number of such plans.

4. ASPA is in a unique position to advise the Court with regard to the implications of the *Meagher* decision because of its intimate familiarity with the actuarial, administrative and financial operations of employee retirement plans.

WHEREFORE, ASPA respectfully requests leave to file the accompanying brief as amicus curiae.

Dated: March 31, 1989

Chester J. Salkind
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QUESTION PRESENTED FOR REVIEW

1. Whether the Ninth Circuit erred in concluding that a plaintiff's limitations period recommences each time an allegedly inadequate benefit payment is made?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, The International Association of Machinists and Aerospace Workers Pension Plan, William Winpisinger, Eugene Glover and George Kourpias as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan, and the respondent, Frank Meagher.

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BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Society of Pension Actuaries submits this brief, amicus curiae, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States in support of the petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 856 F.2d 1418. The opinion of the District Court for the Northern District of California is unreported.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on September 12, 1988. On December 1, 1988, the Ninth Circuit denied a petition for rehearing. A petition for a writ of certiorari was timely filed and this Court's jurisdiction invoked pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Respondent Frank Meagher (hereinafter "Meagher") retired under the IAM Pension Plan (hereinafter "Plan"), a defined benefit plan, on July 1, 1977, and has been receiving benefits since that date. Meagher's complaint, filed May 13, 1986, sought payment of additional pension benefits by challenging the lawfulness of an amendment adopted more than nine years earlier which phased out a post retirement benefit adjustment. This post retirement benefit adjustment provided for an increase in a retiree's monthly benefit in proportion to any salary increase in the position from which the individual retired and was commonly referred to as the "living pension" feature.

Because of adverse financial experience, the Plan's actuaries recommended remedial action, including elimination of the "living pension" feature. An amendment phasing out the "living pension" feature was adopted. In 1979, a letter and summary plan description were sent to Meagher, and all other retirees, explaining how this amendment affected them.

On May 13, 1986, Meagher filed a complaint alleging that the amendment phasing out the "living pension" feature was improperly adopted. The Plan asserted as an affirmative defense, among other things, that Meagher's action was barred by the applicable statute of limitations. On May 22, 1987, the United States District Court for the Northern District of

California dismissed the complaint as untimely filed. The Court found that, in any event:

> "... the statute of limitations began to run at the latest in mid-October, 1979, when plaintiff received a letter from the Union explaining that it was phasing out the living pension. At that time, Meagher had knowledge of the events which gave rise to the course of action."

In an opinion dated September 12, 1988, the Ninth Circuit reversed the District Court and determined that Meagher's complaint was not barred by the statute of limitations. The basis for the District Court's opinion was the novel theory that each benefit check issued in an amount less than claimed by Meagher created an independent cause of action, and the limitation period runs separately for each cause of action.

On December 1, 1988, the Ninth Circuit denied the Plan's petition for rehearing.

INTEREST OF THE AMICUS CURIAE

The American Society of Pension Actuaries (ASPA) is a non-profit organization whose 2,700 members provide actuarial, consulting and administrative services to approximately 30 percent of the private qualified retirement plans in the United States.

One of ASPA's primary purposes is the preservation and enhancement of the private qualified retirement system in the United States. It is our view that the decision of the Ninth Circuit Court of Appeals in Meagher, unless reversed, will have a significant adverse effect on that system by allowing participants receiving lifetime periodic payments to challenge the accuracy of the original benefit determination until death, and the estate to sue thereafter. Periodic payments for life

is a common form of benefit payment from private qualified retirement plans, and a form appropriate to the goal of providing financial security in retirement years. It should be noted that, given current trends in longevity, many retirees will receive periodic payments for 25 years or longer. Renewing the exposure period for challenge to the accuracy of the original benefit determination each time a payment is made will severely inhibit the ability of any plan making periodic payments to engage in rational financial planning, and make employers much less willing to install or continue such plans. It should be further noted that qualified retirement plans are voluntary arrangements not mandated by law, and that it is vital to our national interest that we not create deterrents to the viability of that system.

It is also important to consider the current legal environment in which private qualified retirement plans must operate. These plans, by their very nature, are complex arrangements. They have been made much more so by a profusion of legislation in recent years changing the applicable rules.

Since 1982, we have seen four major acts, each with a profound impact on private qualified retirement plans, TEFRA (Tax Equity and Fiscal Responsibility Act) in 1982, DEFRA (Deficit Reduction Act) and REA (Retirement Equity Act) in 1984, and the TRA (Tax Reform Act of 1986). Each of these legislative rounds necessitated a multiplicity of complex plan amendments. Since most plan administration is computer assisted, the programs written to administer the plans must be revised to conform to whatever administrative differences result. All plan participants affected by change must be notified in one fashion or another. Regulations are rarely issued less than a year after the legislative change, causing further uncertainty and confusion. All this adds significantly to the administrative complexity and increases the possibility of

challenge to a benefit determination. The concept of each benefit check constituting a separate cause of action would create severe difficulties to private qualified retirement plans, assuming there had been a stable legislative environment. Given the rapidity of changes described above, the severity of the problems that this concept will cause will be greatly magnified.

There are about 900,000 private qualified retirement plans in existence in the United States, with assets of approximately 1 1/2 trillion dollars. These plans provide vitally needed retirement benefits to millions of our citizens, as well as play a vital role as a source of investment capital for our economy.

Of course, as our population ages, the need for private qualified retirement plans will intensify. The segment of the population age 65 and older has been increasing at a far more rapid rate than the rest of the population. It is estimated that by 2030, 21 percent of all Americans are expected to be 65 or older, compared with only 11 percent in 1980, which represents more than a 60 percent increase.

As stated above, we believe that *Meagher*, if not reversed, will have a significant negative effect on the private qualified retirement plan system and we urge the Court to consider this factor, as well as the legal arguments, and grant certiorari in this case.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in concluding that each periodic benefit check constituted a new cause of action. The decision in *Meagher* is inconsistent with decisions of this Court and of other Circuits, will cause serious damage to the private qualified retirement system, and will burden the federal courts with a higher level of employee benefit litigation.

ARGUMENT

A. THE NINTH'S CIRCUIT'S RULING THAT THE ISSUANCE OF EACH PERIODIC BENEFIT CHECK CREATES A SEPARATE CAUSE OF ACTION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS IN EMPLOYEE BENEFIT CASES

By holding that the issuance of each allegedly inadequate benefit check constituted a "wrongful application" of the Plan, the Ninth Circuit has created a continuing violation approach to benefit claims which permits a plaintiff receiving lifetime payments to sue until his or her death, and the estate to sue thereafter. Other courts have consistently held that a cause of action for employee benefits arises only when the plaintiff initially learns that an unambiguous decision has been made affecting his benefits. *Martin v. Bankers Trust,* 565 F.2d 1276, 1278 (4th Cir. 1977); *Cowan v. Keystone Profit Sharing Fund,* 586 F.2d 888, 895 (1st Cir. 1978); *Paris v. Wolf, Inc., Profit Sharing Plan, Etc.*, 637 F.2d 357, 360-361 (5th Cir. 1981), *cert. denied,* 464 U.S. 836 (1981); *Belland v. Pension Benefit Guaranty Corp.*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), affd, 726 F.2d 839 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 880 (1984).

Thus the decision of the Ninth Circuit is clearly in conflict with those of other Circuits.

B. THE NINTH CIRCUIT'S RULING AS TO WHEN A CAUSE OF ACTION ACCRUES IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS WITH RESPECT TO OTHER PROTECTIVE STATUTES

In *United Airlines, Inc. v. Evans,* 431 U.S. 553, 559 (1977), this Court held that a discriminatory act begins the running

of the limitations statute even if the act has later consequences. In *Chardon v. Fernandez* 454 U.S. 6, 8-9 (1981), this Court held that an actionable situation is not created as a result of a continuing impact from past violations.

Other courts have found that continuous activity after a union's initial failure to respond to a grievance request does not constitute a continuing violation with respect to suits involving allegations of denial of fair representation pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185. *Adams v. Budd Co.*, 846 F.2d 428, 431 (7th Cir. 1988), *cert pending; Metz v. Tootsie Roll Ind., Inc.* 715 F.2d 299, 305-6 (7th Cir. 1983). In a case brought under Railway Labor Act, it was concluded that the union activity subsequent to the time the challenged agreements were concluded does not constitute a continuing violation. ***Englehardt v. Consolidated Rail Corp.***, 756 F.2d 1368, 1370 (2d. Cir. 1985).

C. THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH THE FUNDAMENTAL PURPOSE OF A LIMITATIONS STATUTE AND WILL BE PARTICULARLY HARMFUL IN THE RETIREMENT PLAN AREA

Determinable limitation periods are vital to insuring fairness to potential defendants and to encouraging stability in economic relationships. It is both inequitable and productive of financial chaos to keep potential defendants at risk indefinitely because of determinations made and communicated many years earlier.

In the instant case, the Ninth Circuit has concluded that the receipt of each periodic benefit check creates a new cause of action. The determination as to the amount to which an individual is entitled is made prior to the time benefits commence

and may be recalculated at a later date if the terms of the benefit plan or amendments thereto change the original benefit amount. The issuance of each check is a ministerial act implementing a prior determination. The theory that each benefit check constitutes a new cause of action is inconsistent with the fundamental concept that a limitation period begins when an individual becomes aware of the facts which would enable him or her to seek legal redress.

It should be noted that retirement plans frequently provide lifetime payments. Given current trends in longevity, it would not be unusual for retirement plans to be paying benefits to a retiree for 25 years or longer. If the ruling of the Ninth Circuit were to prevail, it is obvious that challenges to benefit entitlement determinations could be made decades after these determinations were made. Such an exposure would be extremely detrimental to the private qualified retirement system.

CONCLUSION

It is our view that *Meagher* is legally incorrect, will cause serious damage to the private qualified retirement system, and will burden the federal courts with a much higher level of employee benefit litigation. We ask therefore that the writ of certiorari be granted.

Respectfully Submitted,

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